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A Functional Analysis of Criminal Law

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ARTICLES

A FUNCTIONAL ANALYSIS OF CRIMINAL LAW

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The criminal law has three primary functions. First, it must define and announce the conduct that is prohibited (or required) by the criminal law. Such "rules of conduct," as they have been called, provide ex ante direction to members of the community as to the conduct that must be avoided (or that must be performed) upon pain of criminal sanction. This may be termed the *rule articulation* function of the doctrine. When a violation of the rules of conduct occurs, the criminal law takes on a different role. It must decide whether the violation merits criminal liability. This second function, setting the minimum conditions for *liability*, marks the shift from prohibition to adjudication.[1] It typically assesses ex post whether the violation is sufficiently blameworthy "to warrant the condemnation of conviction."[2] Finally, where liability is to be imposed, criminal law doctrine must assess the relative seriousness of the offense, usually a function of the relative blameworthiness of the offender. This sets, in a general sense, the amount of punishment that is to be imposed. While the first step in the adjudication process, the liability function, requires a simple yes or no decision as to whether the minimum conditions for liability are satisfied, this second step, the *grading* function, requires judgments of degree. It must consider such factors as the relative harmfulness of the violation and the level of culpability of the actor.

This Article argues that these three primary functions of criminal law—rule articulation, liability assignment, and grading—are a useful way in which to analyze and organize criminal law doctrine. Modern criminal codes commonly acknowledge that criminal law serves each of these three functions. However, these same codes fail to see that a given code provision may serve one function but not another; the entire undifferentiated code is seen as serving these functions together. The Model

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1 For a general discussion of the distinction between rules of conduct and principles of adjudication, see Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

2 This is a Model Penal Code phrase. *See, e.g.*, MODEL PENAL CODE § 2.12(2) (1985).

Penal Code, for example, describes "[t]he general purposes of the provisions governing the definition of offenses" as:

> [1] to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
>
> [2] to give fair warning of the nature of the conduct declared to constitute an offense;
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> [3] to safeguard conduct that is without fault from condemnation as criminal;
>
> [4] to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
>
> [5] to differentiate on reasonable grounds between serious and minor offenses.[3]

The first two purposes appear to embody the rule articulation function, the second two the liability assignment function, and the last the grading function. Part II of this Article dissects current criminal law doctrine in terms of these three functions and demonstrates that one can identify specific doctrines as serving specific functions.

The functional differences among doctrines have not been obvious in part because the current organizing structure of criminal law uses distinctions that obscure the law's different functions. The central organizing distinctions in criminal law doctrine have traditionally been those between offenses and defenses and between "actus reus" and "mens rea" requirements. Yet, as Part I demonstrates, each of these categories, as well as the subcategories into which they commonly are divided, contains doctrines that perform each of the three functions of rule articulation, liability assignment, and grading.

The failure of current theory and doctrine to recognize the distinctness of these functions has hurt the law's performance of each. Parts III, IV, and V of this Article give examples of doctrinal shortcomings that may be traced to insensitivity to the distinctiveness of each function.

I. THE STANDARD CONCEPTUALIZATION: OFFENSES AND DEFENSES; ACTUS REUS AND MENS REA

The distinctions between offenses and defenses and between actus reus and mens rea are criminal law's basic organizing distinctions for most lawyers, judges, and code drafters. The offense-defense distinction is reflected in the structure of modern codes. The Model Penal Code, for example, groups offenses in part II of the Code, leaving defenses for part I. The Code recognizes three kinds of defenses. Those relating to an actor's irresponsibility, such as mental illness and infancy, are contained in article 4 of part I. Those relating to the justification of an actor's

[3] *Id.* § 1.02(1). The order of the subsections is altered from the original. Over two-thirds of the states have adopted a criminal code modeled to some extent upon the Model Penal Code. *See Status of Substantive Penal Law Revision: Annual Report*, 60 A.L.I. PROC. 560-63 (1983) (tabulating extent to which states have adopted Model Penal Code).

conduct, such as self-defense and law enforcement authority, are grouped in article 3 of part I. Other miscellaneous defenses, such as duress, statute of limitations, consent, and de minimis, are included in article 2 of part I.

Modern codes also distinguish among kinds of offense elements, although they are more likely to use the modern terms "objective" and "culpability" elements rather than the older Latin labels "actus reus" and "mens rea" requirements. As for mens rea, modern codes typically follow the Model Penal Code in defining four "levels of culpability," as the Code prefers to call them: purpose, knowledge, recklessness, and negligence.[4] The remaining offense requirements typically are termed the offense's "actus reus." Included here are what the Code identifies as three kinds of objective elements: conduct, circumstances, and results.[5] (Each of the four culpability levels is specifically defined with respect to each of the three different kinds of objective elements.)[6] Also included in actus reus are the requirements of a voluntary act or an omission to perform a duty of which one is capable,[7] and of a causal connection between the conduct or omission and any required result.[8]

To summarize, the conceptual structure of criminal law embodied in modern codes might look something like this:

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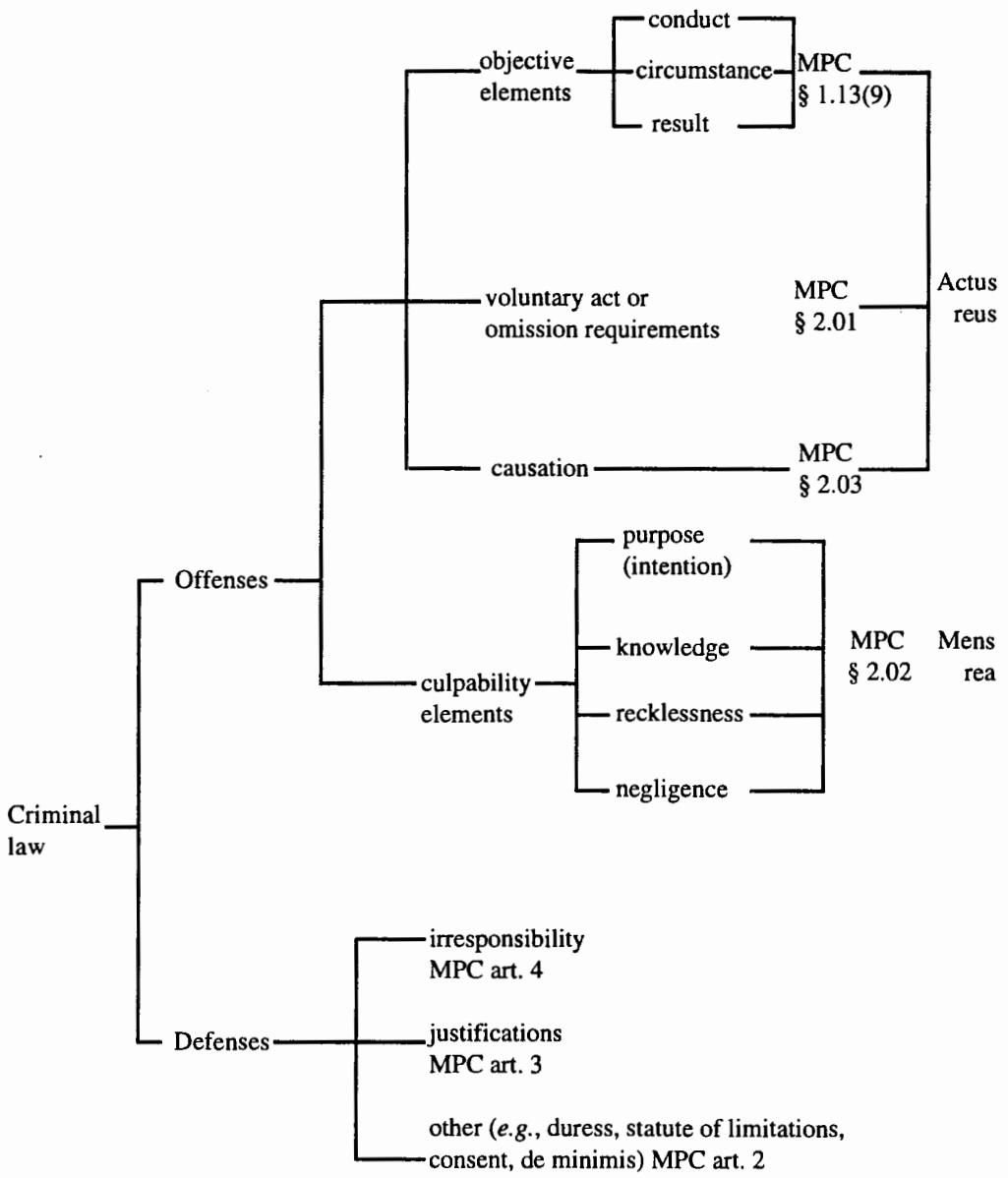
[4] MODEL PENAL CODE § 2.02.

[5] *Id.* § 1.13(9).

[6] *See id.* § 2.02(2). There are two exceptions: recklessness and negligence are not defined with respect to conduct. *See id.* § 2.02(2)(c)-(d); *see also infra* note 13 and accompanying text.

[7] *See* MODEL PENAL CODE § 2.01.

[8] *See id.* § 2.03. The term actus reus sometimes refers only to the voluntary act or omission requirement, sometimes to the conduct, circumstance, and result elements of an offense, and sometimes to both. *See generally* Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?, in* ACTION AND VALUE IN CRIMINAL LAW (Stephen Shute et al. eds., 1993).



MPC = Model Penal Code

Figure 1

Presumably, current doctrine uses these organizing distinctions, rather than others, because they seem more useful than others in conceptualizing and analyzing criminal law. Let these distinctions, then, be the starting point for describing how different doctrines perform different functions.

One might initially estimate that the actus reus requirements define the prohibited conduct, the rule articulation function, and that the mens

rea requirements, with the help of the general defenses, define the minimum requirements of liability for a violation, the liability function. A closer examination, however, suggests that the functional structure of current criminal law is somewhat different.

A. "Actus Reus" Requirements

The conduct and circumstance elements of offense definitions do contribute to the definition of the prohibited conduct, the rule articulation function, but result elements do not. Unlike conduct and circumstance elements, result elements are not necessary to define the prohibited conduct. The criminal law must prohibit an actor's conduct, not the conduct's result, because the law can influence only the actor's conduct. The law may claim to prohibit a particular result; however, the law actually means to claim that it prohibits actors from engaging in conduct that would bring about (or risk bringing about) that result. An actual resulting harm may make the violation more serious, some would argue, but the fortuity of whether the result actually occurs does not alter the nature of the conduct that constitutes the violation. The conduct remains objectionable notwithstanding the happenstance that the result does not occur.[9] Result elements, then, serve only to aggravate an actor's liability, the grading function.

Similarly, the causation requirement—defining the relation between an actor's conduct and a result that will give rise to an actor's accountability for the result—serves the grading function, not the rule articulation function. Like the requirement of a result, the causation rules determine when an actor's liability is to be aggravated because the actor is accountable for a harmful result. Because result elements and causation requirements are not necessary to define the conduct prohibited by the criminal law, it is not surprising that liability does not necessarily depend upon them. If a prohibited result does not occur or if a required causal connection is not established, the actor frequently is liable for a lesser offense, such as an attempt.[10]

Many of the omission and possession rules, which impose liability for an omission to perform a legal duty or for possession of contraband even in the absence of an affirmative act, contribute to the criminal law's definition of the conduct that is prohibited and required. Without the special duty requirements or the special prohibition for the possession of

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[9] However, in some instances, as when less serious harms are only risked, the societal harm of the conduct may be too small to justify criminal condemnation. Conduct creating a low risk of a less serious harm may fall below the line of minimum seriousness required for adequate blameworthiness unless the harm actually occurs.

[10] This is always true for intentional offenses in jurisdictions that have general attempt statutes, as do nearly two-thirds of the states. See the general attempt statutes and their corresponding defense provisions cited at 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §§ 81(b) nn.16-17, 83(f) n.60 (1984 & Supp. 1992).

contraband, the law would not provide a complete description of what is acceptable and unacceptable conduct. Thus, aspects of the commission, omission, and possession rules serve the rule articulation function. However, other aspects of these actus reus rules do not serve the rule articulation function. The voluntariness aspect of the act requirement, the "physical capacity to perform" requirement of the omission doctrine, and the requirement in the possession liability rules that the actor know of his possession for a period sufficient to terminate the possession, do not define prohibited conduct. Rather, those requirements define minimum conditions for holding an actor condemnable for a violation by commission, omission, or possession, respectively. The rules of conduct continue to prohibit possession of certain drugs, even if the possessor of the drug is held nonliable because he did not know of the possession for a period sufficient to terminate it. Filing an income tax return remains a duty, although the nonfiling actor is not punished if it was physically impossible for her to file. In other words, the actus reus requirements of voluntariness, capacity, and knowledge of possession serve a liability function in the same way that many mens rea requirements do. For example, under the mens rea requirements, taking another person's property without permission remains a violation of the rules of conduct although the actor is held nonliable for such a taking where he was unaware of a risk that the property belonged to another person.

B. Mens Rea Requirements

We may tend to think of all mens rea or culpability requirements as serving analogous functions—the liability function of establishing the minimum culpability required for liability for a violation. Purpose, knowledge, recklessness, and negligence are defined as alternative levels of culpability. According to the Code, liability for an offense ordinarily may not be imposed unless one of these culpability levels is proven as to each objective element of the offense.[11] But as with actus reus requirements, by treating all mens rea requirements as a group, the doctrine obscures the different functions that the different requirements perform. Many culpability requirements do serve the liability function, but others do not. Let us examine more closely the nature of culpability requirements.

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[11] "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02(1). Thus, if the objective elements of an offense require that an actor take property of another without the owner's consent, the culpability elements of an offense might require, for example, that the actor purposely take what he knows is property while being reckless as to its belonging to another and reckless as to the owner's lack of consent. For a discussion of the sometimes complex and confusing process of determining the culpability requirements of an offense, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 699-702, 705-06, 710-19 (1983).

First, note that the four levels of culpability do not apply in a symmetrical way to the three kinds of objective elements. When we talk of culpability as to the existence of a *circumstance* element, we refer to the actor's culpability as to the then *present* circumstance. Any of the four culpability levels can apply. As to the circumstance that an actor's sexual partner is less than sixteen years old, for example, the actor may desire the partner to be under sixteen; he may be practically certain (know) that the partner is under sixteen; he may be aware of a substantial risk that the partner is under sixteen; or he may not be aware but should be aware of a substantial risk that the partner is under sixteen.[12] These culpability requirements are what might be called instances of *present circumstance culpability*, to remind us that they refer only to culpability as to then present facts.

When we talk of culpability as to a *result*, in contrast, we necessarily are talking of an actor's culpability as to a then *future* event. Culpability, required by the concurrence requirement to exist at the time of the conduct, as to an actor's conduct causing a result necessarily means culpability as to causing a result that does not at that moment exist. Again, any level of culpability can apply. With regard to an actor's culpability as to causing another's death, for example, the actor may desire to cause the death; he may be practically certain (know) that his conduct will cause the death; he may be aware of a substantial risk that his conduct will cause the death; or he may not be aware but should be aware of a substantial risk that his conduct will cause the death. These kinds of culpability are what might be called instances of *future result culpability*.

When we talk of culpability as to a *conduct* element, the full range of culpability levels does not apply. An actor can be purposeful only as to his or her *own* conduct. Absent a serious disability, an actor engages in conduct only if he desires to do so, if such is his "conscious object." An actor either wishes to engage in certain conduct or does not. Except for persons with control dysfunctions, it makes little sense to speak of an actor who knows or is aware of a risk that he is engaging in or will engage in certain conduct that he does not desire. The Code recognizes this in part when it fails to define "recklessly" and "negligently" with respect to a conduct element.[13] To remind us that only "purposely" is meaning-

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[12] Apparently, the Model Penal Code drafters see no practical significance in the difference between desiring that a circumstance exists and knowing so. The Code defines "purposely" as to a circumstance as requiring only that the actor "*believes or* hopes" that the circumstance exists. MODEL PENAL CODE § 2.02(2)(a)(ii) (emphasis added).

[13] *See id.* § 2.02(2)(c)-(d). However, the Code does define "knowingly" as to conduct; an actor is "knowing" as to conduct when the actor "is aware that his conduct is of that nature." *Id.* § 2.02(2)(b)(i). What does the Code mean by being aware of the "nature" of one's conduct? Presumably, it means that the actor must be aware of the circumstances and results of the conduct. But, if this is what is intended, the drafters have created a troublesome overlap between culpability as to conduct and culpability as to a circumstance and a result, which the Code defines separately and differently. In any given circumstance or result element, how are we to know whether to apply the

ful with regard to one's performing conduct, we may wish to call this kind of culpability *conduct intention*.

Another important difference that characterizes culpability as to one's own conduct is that it can concern either *present* or *future* conduct. For all commission offenses, a *present conduct intention* is required, satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed. For example, an actor does not satisfy this culpability requirement if he does not intend to push the victim but rather does so accidentally as he catches his balance from his own fall. A requirement of present conduct intention essentially duplicates the voluntariness requirement discussed above.

The requirement of a *future conduct intention*, on the other hand, has a critical independent role to play. It serves to show that the actor is planning to do more than what he has already done. Most prominently, attempt liability requires that the actor must intend, must have the "purpose," to engage in the conduct constituting the offense.[14] Such a future conduct intention also is present in substantive offenses that are or that contain codified inchoate offenses. Burglary, for example, requires that an actor enter a building "with purpose to commit a crime therein."[15] Note that the requirement of a *present* conduct intention applies to a corresponding objective element of offense definition, the conduct element, that the actor also must satisfy, just as the requirements of a present circumstance culpability and a future result culpability typically apply to a corresponding objective element. A requirement of a *future* conduct intention, in contrast, by definition has no corresponding objective element but rather exists on its own; the actor need not be shown to have performed the conduct.

In some instances the law requires that the actor have culpability as to *another person's* conduct. For example, the general inchoate offenses of conspiracy and solicitation, as well as complicity liability, require that the actor agree with or solicit or aid another with some level of culpability as to the other person engaging in conduct constituting an offense.[16] While one normally can be only "purposeful" as to one's own conduct, one can have any level of culpability as to causing or assisting another's

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definition of culpability as to a circumstance or as to a result, or instead to subsume the circumstance or result into the "nature of the conduct" and thus apply the definition of culpability as to conduct. The Code provides no means of distinguishing conduct, circumstance, and result elements. If this broad interpretation of conduct is accepted—conduct includes the circumstances and results of conduct—one may wonder why the Code does not allow for culpability lower than knowing; one can be reckless or negligent as to the result or circumstances of one's conduct. The better view is to treat the circumstances or results of one's conduct as circumstance or result elements, each with a distinct culpability requirement (and to disregard the Code's definition of "knowingly" as to conduct). *See generally* Robinson & Grall, *supra* note 11, at 706-10.

[14] MODEL PENAL CODE § 5.01(1)(c).

[15] *Id.* § 221.1(1).

[16] *See, e.g., id.* §§ 2.06(3)(a), 5.02(1), 5.03(1).

conduct. One may hope and desire that another will engage in certain offense conduct; one may not desire it but may know (may be "aware that it is practically certain")[17] that the other will engage in the conduct; one may be aware only of a substantial risk that the other will engage in the conduct; or one may not be aware but should be aware of a substantial risk that the person will engage in the conduct. Such culpability as to another's conduct can be either culpability as to another's present or future conduct. When it concerns another's present conduct, it is simply an example of a present circumstance. When it concerns another's future conduct, which is more often the case, as in solicitation, conspiracy, and complicity, it is a form of a future result. This form of culpability requires a showing that when the actor solicited, conspired with, or aided another, the actor had a given level of culpability as to causing or assisting the resulting conduct by the other person. Culpability as to another's conduct thus does not appear to present a culpability requirement different from present circumstance culpability and future result culpability.

Here, then, are four distinct kinds of culpability requirements—present circumstance culpability, future result culpability, present conduct intention, and future conduct intention—that are grouped together under current doctrine's standard purpose-knowledge-recklessness-negligence scheme. The reformulated distinctions described above are superior because they capture the different functions of mens rea requirements that current doctrine does not.

Only the requirements of a present circumstance culpability and a present conduct intention serve the liability function that we typically ascribe to culpability requirements. They set the minimum requirements for imposing criminal liability for a violation. We might call these "base culpability" requirements. Indeed, as noted above, even a present conduct intention has little practical effect in serving the liability function. It is rarely in dispute, and where disputed, duplicates the voluntariness requirement. Thus, of the four kinds of culpability requirements, present circumstance is generally the only one that establishes minimum liability conditions.

Just as result elements are never a minimum requirement for liability, their corresponding future result culpability requirements are never part of the minimum requirements of liability. (As we shall see, however, this may not be true where the future result culpability exists by itself in attempt liability, where no actual result is required.) Thus, future result culpability typically serves as part of the grading function. This is also the case for many future conduct intentions, such as the future conduct intention in burglary that turns the misdemeanor of trespass into the felony of burglary.

Both future result culpability and future conduct intentions also

[17] *Id.* § 2.02(2)(b).

serve a grading function when used to distinguish among different grades of violations with identical objective elements. The culpability requirements for homicide—murder (purposeful or knowing killing), manslaughter (reckless killing), and negligent homicide—are not designed "to safeguard conduct that is without fault from condemnation as criminal." Rather, they define the conditions for distinguishing between grades of unlawful homicide. Assault with intent to commit rape is another example.[18] The "intent to commit rape" element is used as a basis for increasing the grade of the offense over an assault without such intention. Burglary, as noted above, is a similar example. These culpability requirements serve "to differentiate on reasonable grounds between serious and minor offenses," to use the Model Penal Code phrase.[19] Future result culpability and future conduct intention, serving the grading function, might be termed instances of "aggravation culpability," to distinguish them from the base culpability requirements that serve the liability function.

Base and aggravation culpability may be the most common functions of culpability requirements, but in a few instances, chiefly in the definition of inchoate conduct, culpability requirements can serve the rule articulation function of defining the rules of conduct. That is, they are sometimes necessary to describe the conduct that the criminal law prohibits. In the general offense of attempt, for example, the conduct and circumstance elements of the substantive offense definition only begin to state the criminal law's prohibition. Defining the conduct prohibited by the attempt offense requires something more. A common requirement in modern codes, that the conduct constitute a "substantial step in a course of conduct planned to culminate in his commission of the crime,"[20] is inadequate in itself. As a purely objective matter, some conduct may constitute a "substantial step" toward commission of an offense but in fact be entirely innocent and acceptable conduct not meant to be prohibited. Such conduct becomes unacceptable and a societal harm only when accompanied by an intention to violate the substantive rules of conduct.

For example, lighting one's pipe is not a violation of the rules of conduct, unless it is a step in a plan to ignite a neighbor's haystack. Giving a young girl a ride is not a violation of the rules of conduct, unless it is done with the intention of sexually assaulting her. Thus, to describe the minimum requirements of prohibited conduct, the definition of a criminal attempt must include a state of mind requirement—the intention to engage in conduct that would constitute a rule violation.[21] (In

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[18] *See, e.g.*, CAL. PENAL CODE § 220 (West 1988).

[19] MODEL PENAL CODE § 1.02(1)(e).

[20] *Id.* § 5.01(1)(c).

[21] The same analysis might be made for conspiracy and solicitation. Otherwise acceptable and innocent conduct may become a violation of the prohibition against conspiracy or solicitation if

contrast, the law can prohibit homicide without having to refer to the actor's mental state.) Here, the culpability requirements play a role similar to the conduct and circumstance elements of offense definitions.[22] Typically, such a rule articulation function for culpability requirements appears in "secondary prohibitions," such as those against complicity and inchoate offenses, and involves an intention to violate a "primary prohibition."[23]

Consider the kinds of culpability requirements that serve this rule articulation function. In the most typical attempt offense of incomplete conduct toward a substantive offense, a future conduct intention serves the rule articulation function. The examples above are of this sort: the

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accompanied by an intention to conspire with or to solicit another to commit a substantive violation of the rules of conduct. However, conspiracy and solicitation might be distinguishable from attempt. One could argue that the rules of conduct ought to prohibit agreements with or solicitations of another to violate the rules of conduct, even if not done with the intention of causing a violation of the rules. Any agreement (even unilateral) to commit an offense and any solicitation of another to commit an offense might be seen as harmful conduct. The harmfulness of the conduct might not necessarily depend upon the actor's subjective state of mind. Therefore, the rules of conduct might appropriately prohibit all agreements and solicitations to commit an offense, whether intentional or inadvertent. That is, the rules might require one to avoid conduct that even accidentally gives the appearance of such an agreement or solicitation. Recall Henry II's rhetorical question, "Won't someone rid me of this troublesome priest?," which was mistaken as a directive to kill Thomas Beckett. One's lack of intent may suggest a lack of blameworthiness, but we nonetheless may wish to announce that even inadvertent agreements and solicitations are to be avoided. After all, one might argue, there is no analogously harmful "unintended attempt."

[22] An offense containing a criminalization mental element commonly contains culpability mental elements as well. In attempted assault, for example, the intention to engage in the conduct constituting the assault is a criminalization mental element; it is necessary for a description of the prohibited conduct. The same offense contains a culpability mental state requiring at least recklessness as to the victim being a person. Under MODEL PENAL CODE § 211.1(a), for example, the assault must be to another human being. MODEL PENAL CODE § 2.02(1) requires proof of culpability "with respect to each material element of the offense." That is, the definition of the prohibited conduct is complete even without this requirement; actors are warned not to attempt to assault persons even though this actor will not be punished for his assault because he was faultless or only negligent as to the victim being a person (*e.g.*, he attempted to abort what he believed to be an inviable fetus or he set a hunting trap for what he thought was a dog stealing his chickens).

[23] The conduct and circumstance elements of specific offense definitions define the primary prohibitions of the criminal law. But the criminal law prohibits not only conduct that violates primary prohibitions, but also conduct aiming toward that end. These secondary prohibitions proscribe assisting, attempting, soliciting, and conspiring to commit prohibited conduct. The secondary prohibitions thus enlarge the primary prohibitions: just as one may not violate a primary prohibition, neither may one assist or attempt or solicit or conspire to commit such a violation. Secondary prohibitions typically are of two sorts: (1) doctrines expanding the primary prohibition by imputing to the actor the conduct of another, as in complicity; and (2) doctrines expanding the primary prohibition by prohibiting conduct short of the substantive harm or evil, as in the inchoate offenses of attempt, conspiracy, solicitation, and possession. Secondary prohibitions sometimes are contained in general code provisions that incorporate by reference the offense definition containing the primary prohibition, as with general inchoate offenses and complicity provisions. Secondary prohibitions also sometimes are contained in specific offenses, such as special codified attempt provisions (*e.g.*, assault with intent to rape, burglary, and possession of burglar's tools). For further discussion, see *infra* part IV.A.

actor's intention to engage in future conduct, the conduct necessary to burn the haystack or to sexually assault the hitchhiker, makes his otherwise acceptable conduct unacceptable.

In other, perhaps more unusual, attempt cases, the actor has completed the conduct necessary for commission of the offense, but some other required objective element is missing. The actor pulls the trigger of a gun, which would kill another except that the gun is inoperative. The cases and literature call this a case of "factual impossibility." It was punished as an attempt at common law and is so punished in most American jurisdictions.[24] The actor's intention to engage in future conduct does not make his conduct criminal, but rather his future result culpability, his culpability as to causing another's death, does so.

In still other cases, an actor's otherwise acceptable conduct may be criminalized by his present circumstance culpability. The actor buys sugar believing it an illegal drug. His intention to perform some future conduct does not make his conduct unacceptable, nor does his culpability as to causing a prohibited future result. The conduct itself is entirely acceptable but is made criminal by the actor's belief that the powder is an illegal drug. Such a case of "legal impossibility," as the literature calls it, was not punished at common law. Today, it is punished under the Model Penal Code and the majority of American codes.[25]

To summarize, the incomplete conduct ("substantial step") addressed by subsection (1)(c) of the Model Penal Code's attempt provision[26] requires a future conduct intention. The completed conduct but missing result (factual impossibility) dealt with under subsection (1)(b) of the Code's provision requires a future result culpability. The completed conduct but missing circumstance (legal impossibility) dealt with under subsection (1)(a) requires a present circumstance culpability. Note that the functional distinctions identify and explain differences between the culpability requirements of the attempt categories used in modern codes. This is true even though the Code's provisions give no hint that the functional distinctions call for identifiably different culpability requirements. The functional distinctions also are useful in making the common law's notoriously difficult factual-legal impossibility distinction noticeably more workable. They also better focus the debate over whether liability should be imposed in cases of legal impossibility, as it is in cases of factual impossibility. In determining whether the two kinds of cases are meaningfully different, one can ask whether present circumstance culpa-

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[24] *See, e.g.*, MODEL PENAL CODE § 5.01(1)(a); Ira Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, 419-22 (1986); 1 ROBINSON, *supra* note 10, § 85(b). This form of attempt liability relies even more heavily than others upon an actor's subjective state of mind to justify liability, for the possibility of a successful violation exists only in the actor's mind.

[25] Robbins, *supra* note 24, at 419-22.

[26] MODEL PENAL CODE § 5.01.

bility is for some reason less appropriate as a ground for criminalization than future result culpability.

To conclude, while traditional analysis does not distinguish among culpability requirements other than among the levels of culpability—purpose, knowledge, recklessness, and negligence—a functional analysis suggests different relevant groupings of "mens rea" requirements—present conduct intention, present circumstance culpability, future result culpability, and future conduct intention. As later Parts of this Article will more fully illustrate, these functional distinctions can be useful in both applying and analyzing current doctrine.

The functions that different kinds of culpability requirements perform may be summarized as follows:

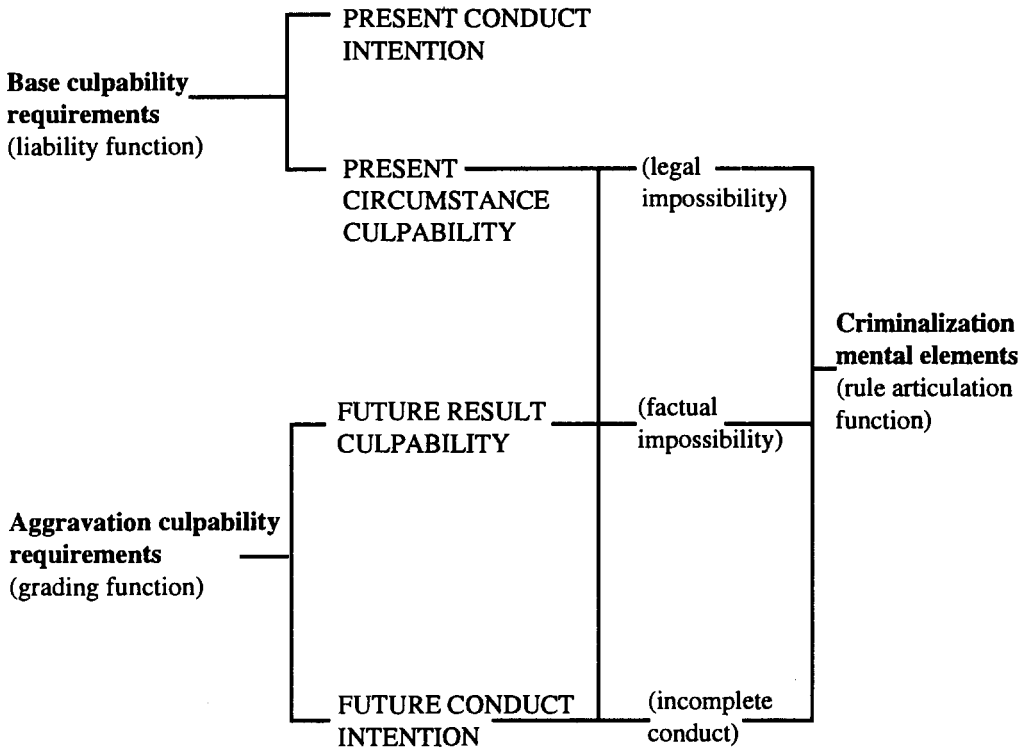

Figure 2

The presence of "base culpability" suggests that conduct that violates the rules of conduct is blameworthy. Present circumstance culpability requirements do most of this work. "Aggravation culpability" serves to aggravate an actor's liability over the minimum. Future result culpability and future conduct intention requirements perform most of this function.[27] Finally, on occasion, "criminalization mental elements" are

[27] Empirical evidence suggests that people perceive some sorts of culpability requirements as being more significant to grading than others. In a recent empirical study, subjects were given a

necessary to define the conduct prohibited by the criminal law. In incomplete conduct cases, future conduct intention performs this function. In completed conduct cases, the function is performed by future result culpability (factually impossible attempts) and, in some jurisdictions, by present circumstance culpability (legally impossible attempts).

C. Defenses

One might initially be tempted to see defenses as serving the liability function; the absence of any defense is a minimum condition for liability for a violation of the rules of conduct. That is, the presence of a defense bars liability for what otherwise would be a blameworthy violation. But, as with actus reus and mens rea requirements, not all defenses serve the same function. Many do serve the liability function, but some serve a rule articulation function and a few even serve a grading function. Current doctrine's conceptualization of defenses, as relating to either irresponsibility defenses, justification defenses, or "other" defenses, does not track the functional differences. Irresponsibility defenses serve a liability function, but so do many other defenses and some aspects of the justification defenses in modern codes. Justification defenses serve primarily the rule articulation function, but the common subjective formulation of justification defenses (more on this later)[28] gives them a liability function as well. Other defenses comprise a mix of defenses that include all functions.

I have suggested elsewhere that the concept of "defenses" draws together many very different sorts of doctrines and have raised what I see as the important distinctions among them. Specifically, I suggested that a more useful conceptualization would distinguish failure of proof defenses, offense modification defenses, (objective) justifications, excuses, and nonexculpatory defenses.[29] Let me structure the following discus-

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number of scenarios describing similar instances of property destruction where the actor's culpable state of mind is different in each scenario. In one set of scenarios, his culpability as to causing the damage (a future result intention) is varied among the set. In another set of scenarios, his culpability as to the property being property of another (a present circumstance culpability) is varied among the set. (In each instance, his culpability level as to all other elements is held constant.) Subjects varied the degree of liability assigned to the actor according to his level of culpability as to causing the damage. His liability did not vary so much when his culpability as to ownership of the property varied. The subjects apparently perceived the actor's level of culpability as to causing the damage as much more important in determining the proper level of liability than the actor's level of culpability as to ownership. *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME (forthcoming 1994) (manuscript at 89-98, study 8, on file with author). This suggests that subjects in fact perceive the future result culpability as performing a grading function, while the present circumstance culpability does not. Without further research, it is unclear whether this pattern holds for other present circumstance culpability and future result culpability requirements.

[28] *See infra* part III.C.

[29] *See* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982); 1 & 2 ROBINSON, *supra* note 10.

sion around these distinctions, for they correspond somewhat better to the differences in defense functions.

Failure of proof defenses, which are simply instances of negating a required offense element, have been discussed above in the context of actus reus and mens rea. For example, mistake that negates a base culpability requirement (required culpability as to a present circumstance or required intention as to present conduct) serves a liability function. Mistake that negates an aggravation culpability requirement (required culpability as to a future result or required intention as to future conduct) serves a grading function.

Many offense modification defenses, which appear outside and independent of offense definitions, serve the rule articulation function. These doctrines, such as the consent defense, further modify or refine the conduct rules. While the rules prohibit conduct that risks causing bodily harm, an exception to the prohibition is admitted where the victim consents to a risk of minor injury or where the risk arises from participation in a lawful sporting event.[30] But other offense modification defenses perform a liability function. They serve to assure adequate blameworthiness for liability. The de minimis defense, for example, bars liability if the actor's conduct caused the harm or evil prohibited by the offense "only to an extent too trivial to warrant the condemnation of conviction."[31] Other defenses, such as renunciation, similarly refine the normal blameworthiness requirements for inchoate offenses.[32]

Justification defenses, objectively defined, perform exclusively a rule articulation function. The law recognizes that in some instances a greater harm may be avoided or a greater good achieved by allowing a person to do what the law normally prohibits. Burning another person's property, normally a violation, is tolerated (even encouraged) if the burning acts as a firebreak to save a town. Striking another person without that person's consent, normally a violation, is lawful if necessary to overcome resistance to a lawful arrest. A full account of what the law requires of persons must define the instances in which an actor is permitted, even encouraged, to do what the law otherwise deplores. In contrast, excuse defenses—such as insanity, immaturity, involuntary intoxication, and duress—serve exclusively a liability function. They define the instances in which an actor is held blameless for a violation of the rules of conduct. Nonexculpatory defenses serve none of the traditional functions of the criminal law, which is why they are disfavored and narrowly limited.[33]

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[30] *See, e.g.*, MODEL PENAL CODE § 2.11(2)(a)-(b).

[31] *Id.* § 2.12(2).

[32] Complete and voluntary renunciation, as defined in modern codes, *see, e.g., id.* § 5.01(4), arguably undercuts an actor's blameworthiness by suggesting that the actor's earlier apparent intention to commit the offense was not in fact sufficiently resolute to warrant condemnation.

[33] For a general discussion of nonexculpatory defenses, see Robinson, *supra* note 29, at 229-32.

II. Rule Articulation, Liability Assignment, and Grading

Having pulled apart current law to show how different doctrines serve different functions, let me reassemble it along the lines of the three basic functions. The doctrines that serve the rule articulation, liability, and grading functions may be summarized as follows:

Rule Articulation Function	Liability Function	Grading Function
Violation Doctrines	**Culpability Doctrines**	
Primary Violations: Conduct and circumstance elements of offense definitions	Base culpability requirements: primarily present circumstance culpability	Result elements of offense definitions
Legal duty requirements for omission liability; possession of contraband prohibition in possession offenses	Offense modification defenses relating to criminalization mental elements, such as renunciation defense, or to base culpability requirements	Causation requirements
Offense modification defenses relating to conduct or circumstance offense elements, such as consent	Doctrines imputing culpability requirements, such as doctrines of voluntary intoxication and substituted mental elements	Aggravation culpability requirements: typically limited to future result culpability and future conduct intention
Secondary Violations: Conduct toward a violation, such as attempt	De minimis defense, setting minimum harm or evil requirements	Doctrines imputing aggravated culpability, such as felony murder
Assisting another in a violation	**Excuse Doctrines**	Miscellaneous offense mitigations and aggravations
Criminalization mental elements	Voluntariness requirement, in commission offenses	
Justification Doctrines	Physical capacity requirement, in omission offenses	
Justification defenses	Requirement of knowledge of possession for a sufficient time to terminate the same, in possession offenses	
	Excuse defenses	

Figure 3

In determining which doctrines serve which function, the previous discussion has grouped them as if each doctrine serves exclusively one function or another. In fact, the interrelation of the doctrines is slightly more complex. A complete description of the minimum requirements for

liability requires not only reference to the doctrines serving the liability function but also to those doctrines serving the rule articulation function. In other words, one prerequisite of liability is violation of the rules of conduct, as described by the doctrines serving the rule articulation function. Similarly, the criminal law's grading function cannot be performed by reference to the doctrines of grading alone. The doctrines of liability define the minimum grade in each instance. The doctrinal functions—ordered as rule articulation, liability, and grading—may best be thought of as having a cumulative relation: the doctrines serving a function include those serving previous functions. Their interrelation might be depicted as:

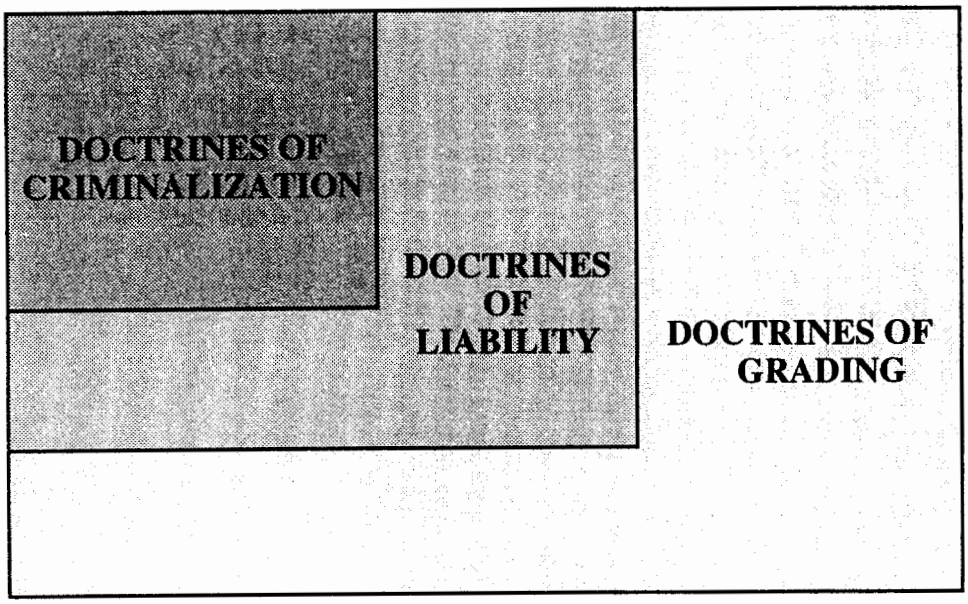

Figure 4

A comparison of this conceptualization to the Model Penal Code scheme diagramed in Part I might look roughly like the following:

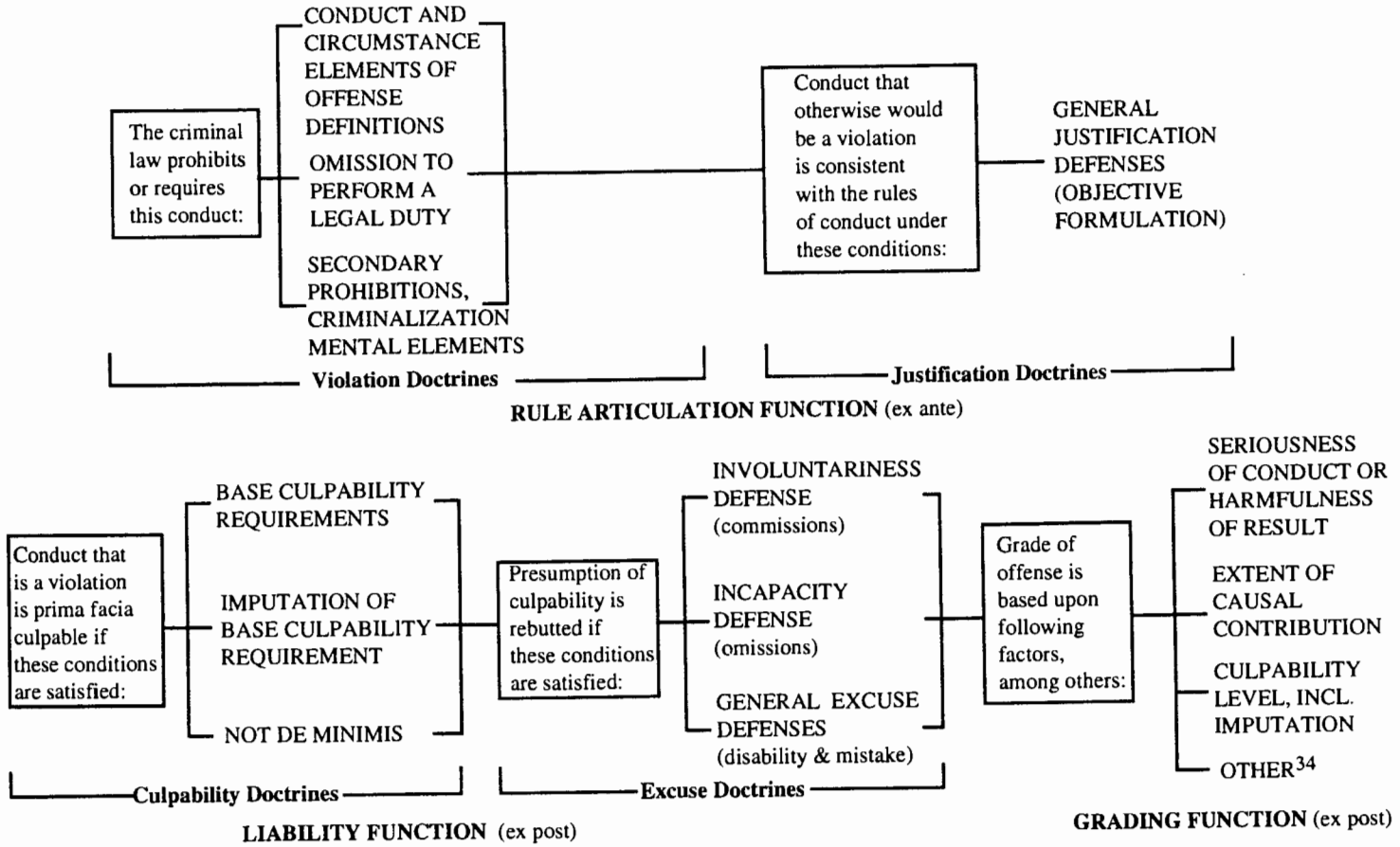

Figure 5

[34] *See infra* part V.B-C.

Does viewing current doctrine in this way—grouping the aspects of the doctrine that share a common function—provide some useful insights? Does this conceptualization help answer the central questions regarding the criminal law's performance: Do the rules of conduct effectively communicate what the criminal law commands? Do the doctrines of liability assure that blameworthy violators are held liable and that blameless violators are not? Do the grading doctrines capture our common moral intuitions as to how much punishment is deserved for a blameworthy violation? The Parts that follow offer a few insights on these issues that come into focus through the lens of the rule articulation-liability-grading prism. I do not mean to suggest that they contain an exhaustive list of possible insights from the distinctions nor that these observations provide a comprehensive answer to the questions regarding the criminal law's performance. The observations are meant only to illustrate that a functional analysis can be useful.

III. The Rules of Conduct: What Does the Criminal Law Command?

It seems only reasonable that society tell its people in an understandable form what the criminal law expects of them. Indeed, our condemnation and punishment of criminals, as distinguished from civil violators, rests upon an assumption that a criminal violation entails some consciousness of wrongdoing or at least a gross deviation from a clearly defined standard of lawful conduct. How can this assumption be sustained if the commands of the law are unclear? How can we condemn and punish violations of the rules of lawful conduct if the rules are not and cannot reasonably be known by the general public? One also may wonder how effective the criminal law can be in deterring criminal conduct if the law's prohibitions are unclear. The criminal law has a great interest in effectively communicating the rules of conduct.

A. Obscuring Rules of Conduct with an Overlay of Liability and Grading Rules

Do current criminal codes tell citizens the commands of the criminal law? What would it take to construct a rough approximation of the rules of conduct from a modern criminal code? One could begin by reading the offense definitions, but then most of the culpability requirements would have to be removed. Of course, some culpability requirements must be retained—those that serve the rule articulation function, such as the future conduct intention in attempt, as Parts I and II discussed. And all result elements must be excluded. Of course, result offenses, without the results, are only risk-creation offenses, many of which already exist in the code. Manslaughter without death is reckless endangerment. In other words, some entire offenses, such as manslaughter, exist not to serve a rule articulation purpose but only to serve a grading purpose.

These "grading offenses" also must be excluded in an approximation of the rules of conduct. Also to be excluded are all the doctrines of aggravation, mitigation, and grading, noted in Part II. Some defenses also must be excluded, notably excuses and nonexculpatory defenses, while others are kept, such as justification defenses. (Although, as we shall see, only some provisions or parts of provisions relating to justification bear on the rules of conduct.) Another way of visualizing the difference between the rules of conduct and current criminal codes is to compare the chart of current conceptualization, at the beginning of Part I, to the first column of the functional analysis summary, at the beginning of Part II.

One may wonder whether it is possible for anyone other than a criminal law scholar to derive even a rough approximation of the criminal law's rules of conduct from a modern criminal code. The task is all the more difficult with the less systematic older codes that frequently codify arcane common law doctrine. Certainly, a statement of the rules of conduct will look substantially different than a code's collection of specific offense definitions. The undifferentiated commixture of rules of conduct, liability, and grading in a single code introduces significant complexity that obscures the rules of conduct. It seems unrealistic to expect the average person to read, understand, and govern their conduct by the rules of conduct embedded in any current criminal code.

In reality, the average person is left to ascertain the law's commands from his or her own moral intuitions about what ought to be prohibited, from word of mouth, or from press reports of criminal case dispositions. But each of these methods of communicating rules of conduct has serious shortcomings, many of which are created or exacerbated by present law's commixture of doctrines serving different functions.

Press reports of criminal case dispositions are necessarily ad hoc and frequently of questionable accuracy. Some criminal law professors and lawyers suggest that the press get the liability rules wrong more often than they get them right (sometimes for good reasons, as discussed below). Word of mouth can be worse; like the child's "telephone" game, every telling can introduce a slight variation in the story. And the original source of word of mouth information frequently is a press report. More on press accounts and word of mouth in the next section.

A community's shared intuitive notions will provide some guidance for the most serious offenses. Members of every culture probably understand that killing another person is wrong. But most cultures recognize exceptions, and the nature of these exceptions may not be quite so clear. (Can you kill a thief if that is the only way to stop his persistent theft of the garden vegetables you need to feed your family?) Especially in our multicultural society, which is predicted to grow even more diverse, it is dangerous to rely too heavily upon shared intuitive understandings as the source of society's conduct rules. While one might expect some shared notions of culpability and blame, necessarily matters of intuitive judg-

ment, it is less clear that a citizen can reasonably be expected to intuit her tax obligation or the contours of criminally fraudulent conduct. Shared notions of desert may govern the liability and grading functions, but utilitarian concerns for protecting societal interests may heavily influence the definition of prohibitions and duties. Further, the existence of an intuitive understanding of conduct rules no doubt depends in some part on confirmation and reinforcement of such rules by existing moral authority, which in many societies is the criminal law as much or more than any other institution.

B. Confusing Conduct Rules and Liability Judgments: Ambiguous Acquittals

The difficulties inherent in an informal and ad hoc dissemination process are made all the more severe by the tendency of current doctrine to obscure the meaning of publicly reported dispositions. Reports of criminal case dispositions, in the press or by word of mouth or both, are doomed to confusion or inaccuracy because our public adjudication system frequently fails to provide information adequate to determine the disposition's meaning for the rules of conduct. For example, a verdict of "not guilty" may mean either (1) that the actor's conduct in the case *did not* violate the rules of conduct or (2) that the actor's conduct *did* violate the rules of conduct but that he does not have the minimum blameworthiness required to be held criminally liable for the violation. Thus, any acquittal might be understood either to approve or to disapprove the actor's conduct.

The state court acquittal of the officers who beat Rodney King illustrates the point. Many people found the acquittal outrageous because it seemed to condone the use of excessive and unnecessary force:

> [The verdict] sends out a message that whatever you saw on that tape was reasonable conduct.[35]
>
> [The verdict] tells me that police can do what they want. Everyone in the world saw that man get whipped and I don't know what the jury was seeing.[36]
>
> What does it take to prove they're guilty? They're saying, "So what if you videotape me, I still can beat you up."[37]

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[35] Los Angeles Deputy District Attorney Terry White, *reported in* Seth Mydans, *The Police Verdict*, N.Y. TIMES, Apr. 30, 1992, at A1. Mr. White was the prosecutor in the case. *Id.*

[36] David Green, 32 year old northeast Washington construction worker, *reported in* Sue Anne Pressley, *Case Casts Long Shadow*, WASH. POST, May 1, 1992, at A1.

[37] Hilda Whittington, a Chicago nutritionist who is African-American, *reported in* Isabel Wilkerson, *Riots in Los Angeles*, N.Y. TIMES, May 1, 1992, at A23. In the same vein:

> It sends a very scary message to me. I can be driving my car and fitting a description. I try to respect cops as much as I can. I feel they should do the same. I'm very scared that something like this could happen to me.

Emilio Henry, an African-American senior at Texas Southern University, *reported in id.* Similarly:

> The verdict sends two messages. For those who wear the uniform of the law, the message is

> [I]t is an outrage that our system can't punish those—particularly police officers—who use the power and majesty of the state to beat some man senseless.[38]

But the issues at trial went beyond the propriety of the conduct; the trial also focused on the blameworthiness of the officers, including an examination of the danger that the officers felt, the confusion and uncertainty of the situation from the officers' perspective, the emotion generated by the preceding high-speed chase, and the training that the officers had for dealing with such a situation.

> In the words of defense attorney Michael Stone, their goal was to persuade jurors to view the incident "not through the eye of the camera but through the eyes of the police officers."
>
> . . . .
>
> . . . On the night in question, [the officers] confronted a 250-pound man who they believed—wrongly—to be intoxicated with the drug PCP, said to endow users with "superhuman strength."[39]

After hearing the evidence at trial, one juror explained the verdict this way:

> At one point, King lunged at and connected with Officer Powell. The cops were simply doing what they'd been instructed to do. They were afraid he was going to run or even attack them. He had not been searched, so they didn't know if he had a weapon. He kept going for his pants, so they thought he might be reaching for a gun . . . . I have no regrets about the verdict. I'll sleep well tonight.[40]

Another juror explained:

> [King] refused to get out of the car . . . so the police department had no alternative. He was obviously a dangerous person, massive size and threatening actions . . . . They're policemen. They're not angels. They're out there to do a lowdown dirty job. Would you want your husband doing it, or your son or your father?[41]

The conflict in perspectives arises in part because the simple verdict of "not guilty" fails to tell the whole story in a most important respect.

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that anything goes; for those whose only badge is their skin color, the message is to expect no justice from the criminal justice system.

Eddie Williams, president of the Joint Center for Political and Economic Studies, a D.C. think tank focusing on African-American affairs, *reported in* Paul Taylor, *A Case of Haunting Images and Perplexing Questions: Black Leaders Voice Deep Despair over a 'Great American Tragedy'*, WASH. POST, May 1, 1992, at A29.

38 Jerry Brown, former Governor of California, *reported in* William Raspberry, *Where's the Outrage from White America?*, WASH. POST, May 1, 1992, at A27.

39 Leef Smith, *Jury Was Asked to See Events As Police Did; Defense Depicted Officers in Urban Jungle*, WASH. POST, Apr. 30, 1992, at A25. Officer Powell explained to the jurors:

> He had very powerful arms. This was a big man . . . . I was completely in fear for my life, scared to death that if the guy got up again he was going to take my gun and there would be a shooting, and I did everything I could to keep him down on the ground.

Id.

40 *The Jury's View*, WASH. POST, May 1, 1992, at A33.

41 Smith, *supra* note 39, at A25.

The jurors voted "not guilty" presumably because they did not think the *officers* were sufficiently blameworthy to merit criminal conviction. Many persons hearing the verdict took it as approval of the officers' *conduct*. That is, the "not guilty" verdict was interpreted by some as condoning the conduct, whereas the jury may have reached the verdict upon finding inadequate blameworthiness, a subjective assessment, for what may well have been objectively excessive conduct.

What is needed is a verdict system that distinguishes "no violation" acquittals from "blameless violation" acquittals. If one were to follow the form of the "not guilty by reason of insanity" verdict, one might ask a jury to return a verdict of "no violation" (or just "not guilty") where the rules of conduct have not been violated, and a verdict of "not guilty by reason of mistake [or excuse]"[42] where the rules of conduct have been violated but where the violation is not blameworthy.

If the first Rodney King jury had returned the latter verdict, it might have better assured other citizens that the taped conduct was disapproved, not condoned. It might also have made it clearer to police officers that they are not authorized to engage in such conduct under similar circumstances in the future. But, as the next section illustrates, the success of such a verdict system depends upon the doctrine in fact distinguishing between the rule articulation issue and the liability issue. In the Rodney King case, that means that the doctrine must put distinct questions to the jury: (1) Was the conduct a violation? (2) If so, was the violation blameworthy? As we shall see, the doctrine governing the use of force in law enforcement mixes these questions, as indeed do all justification defenses.

Instead of clarifying and reinforcing the rules of acceptable conduct, the current verdict system can undercut and confuse an understanding of the rules. The tendency of current dispositions to confuse rather than educate may explain why we are not rushing to insist on wider dissemination of such dispositions or more careful reporting of them. The natural play in press and word of mouth accounts may well have a corrective effect, adding insights about what the disposition means for the rules of conduct, insights that the verdict itself fails to provide.

C. Mixing Rule Articulation and Liability Functions by Defining "Justified" Conduct Subjectively: The Failure to Define the Justified Conduct Rules

The rules of conduct are obscured not only by the overlay of liability and grading doctrines, as Part III.A discussed, but also by mixing func-

[42] The jury might be asked to give the particular grounds of excuse—"not guilty by reason of duress" or "not guilty by reason of mistake as to a justification"—but there seems little benefit from this requirement and it would require that the jurors come to agreement on the ground of exculpation.

tions in the formulation of a single doctrinal provision. An example with broad effect is the tendency of current codes, following the lead of the Model Penal Code, to obscure the rule articulation doctrines of justification by combining them inseparably with doctrines of liability. Was there justification for the use of force shown on the ghastly Rodney King videotape? The justification provision for use of force in law enforcement in most American jurisdictions is defined *subjectively*:

> [T]he use of force upon or toward the person of another *is justifiable when* the actor is making or assisting in making an arrest and *the actor believes* that such force is immediately necessary to effect a lawful arrest.[43]

This same form is used for most justification defenses. Self-defense commonly is defined to provide:

> [T]he use of force upon or toward another person *is justifiable when the actor believes* that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.[44]

Thus, according to the Code, King's beating was justifiable if the officers "believed" at that moment that the force was necessary for the arrest regardless of whether their belief was wrong.

It is the claim that the conduct was "justified" that caused outrage over the acquittal. For, as the previous section illustrates, many people reasonably interpret a finding of "justification" to mean that the conduct was proper and is condoned. In fact, the finding may reflect the opposite conclusion, that the conduct is disapproved. It is justified only in the sense that, when viewed from the actor's unique and possibly mistaken perspective, the actor believes the conduct to be justified. This crucial ambiguity assures that confusion over the meaning of an acquittal for the rules of conduct can occur in most justification cases.

The Model Penal Code drafters are not ignorant of the distinction between acceptable or unacceptable conduct. In a somewhat obscure provision, the definition of "unlawful force," the Code refers to "privileged" conduct, conduct which cannot lawfully be resisted (it is not "unlawful force" and therefore does not trigger a right to use defensive force).[45] Unprivileged conduct can lawfully be resisted. But the Code includes both privileged and unprivileged conduct within "justifiable" conduct. An actor's conduct is "justifiable" if it is within the rules of conduct (privileged) or if it violates the rules of conduct under the actual facts (unprivileged) but the actor mistakenly believes it is justified.[46] Because of this formulation of justification defenses, a jury is never asked to

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[43] MODEL PENAL CODE § 3.07(1) (emphasis added).

[44] *Id.* § 3.04(1) (emphasis added).

[45] *Id.* § 3.11(1) (defining "unlawful force" as used in justification defenses).

[46] In the unprivileged justification case, the actor may receive a complete defense, despite his mistake, if his mistake is reasonable; if his mistake is honest but unreasonable, many jurisdictions provide a mitigation in liability. *See, e.g., id.* § 3.09(2).

determine whether the conduct is objectively proper. The jury need only determine whether the actor's conduct was *either* (1) in fact proper, or (2) improper but the actor believed it proper. (Note that the members of the jury need not even agree among themselves as to which of these two alternatives is true. Thus, even the members of the jury may be unable to clarify an ambiguous acquittal.) The ultimate effect is that, even if a more refined verdict system were in place, the Code's subjective formulation of justification defenses leaves it unclear as to whether a jury should select a no violation or a blameless violation verdict.

To be clear, an excuse or mitigation for mistaken (unprivileged) justification is entirely appropriate, even necessary, as a means of imposing liability and punishment that match the actor's blameworthiness. The difficulty with subjectively defined justifications is not that they provide such a defense but that they fail to distinguish this excuse from liability from a defense arising from objectively justified (privileged) conduct. The failure can mislead people into thinking that conduct in violation of the rules of conduct is acceptable. Such subjective formulations of justification defenses might better be replaced with objective formulations, which accurately state the rule of conduct, and with separate provisions that give an excuse or mitigation for a mistake as to a justification.[47] A defense under the objective justification provision would give a no violation acquittal; a defense under the mistaken justification excuse would give a blameless violation acquittal.

D. Mixing Conduct Rules of Risk-Creation with Liability Judgments of Risk-Taking: The Failure to Define Criminal Risks

Another instance in which current doctrine combines and thereby confuses a rule articulation issue with a liability issue arises in defining what constitutes a criminal risk. Because danger may be created in an infinite number of ways and in an infinite number of situations, the prohibition must use risk as the defining concept; no specific set of acts and circumstances can adequately define the prohibited conduct.

Admittedly, describing the risks that the criminal law prohibits is a formidable task. It would be unwise to say simply: "No person shall engage in conduct that may cause injury to another person or damage to another's property." Some risks, even risks of personal injury to other persons, are tolerated by the criminal law. Part II noted at least three doctrines that tolerate risks. A victim's consent to a nonserious risk of injury is a defense. Creating a risk that avoids a greater risk typically gives rise to a justification defense. A prosecution for creating a trivial risk is subject to dismissal under the de minimis infraction defense. But

[47] For a rare example of a code that segregates the issues of justification and mistake as to a justification by defining justifications objectively and providing a separate excuse provision, see N.D. CENT. CODE §§ 12.1-05-03, -04, -07, -08, -12 (1985).

consensual, justified, and trivial risks described by these doctrines represent only a minority of the tolerated risk situations. In nearly every instance of potential harm, the criminal law prohibits and punishes only the creation of risks of a certain probability and severity of harm under certain circumstances. If you decide to build a factory, drive to the theater, or open your umbrella, you necessarily create risks to others that did not previously exist. Part of the criminal law's rule articulation function is to tell persons beforehand which risks—what probability of how serious a harm under what circumstances—must be avoided. Yet, as we shall see, the doctrine fails to give even a clear general formula by which one can determine which risks are criminal.

The persons put at risk by your factory-building, driving, or umbrella-opening have not consented to such risks in the way that the consent defense of the criminal code requires.[48] Nor is the creation of such risks justified in the way that the justification defenses of the criminal code require.[49] The de minimis defense gives only a most general standard for determining whether a violation is de minimis: "too trivial to warrant the condemnation of conviction";[50] it provides little help in distinguishing criminal from noncriminal risks.[51] As we shall see, however, why the law tolerates some risks is similar in some respects to why the law recognizes the consent, justification, and de minimis defenses.

To determine whether creation of a risk is proper or improper, whether its creation is a violation of the rules of conduct, we need to know, among other things, the probability and the seriousness of the harm risked. Negligible risks of even serious harms are tolerated as the price we all pay to be part of a modern, industrialized society. We have all, in a sense, consented to such risks by choosing to remain in society knowing that such risks exist and are tolerated. Substantial risks of minor harms are similarly tolerated for similar reasons. Only significant risks of significant harms are criminalized, using a sliding scale between the two factors: the lower the probability, the more serious must be the potential injury to reach the point of criminalization.

In addition to the extent of the risk, the societal benefits of the risk also are relevant to whether it is tolerated. In an analysis analogous to

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[48] Consent is a defense if it "negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." MODEL PENAL CODE § 2.11(1).

[49] The lesser evils defense, the only justification that might be applicable, requires that the offense avoid a greater harm or evil. It does not authorize violations in order to create a *benefit*, such as financial profit from a factory or entertainment from attending the theater. Nor is the harm of getting wet likely to sufficiently justify conduct that is otherwise criminal. As the text discusses, however, the lesser evil defense's normative valuation of the actor's conduct has similarities to the assessment made in the definition of a criminal risk.

[50] MODEL PENAL CODE § 2.12(2).

[51] For example, it fails to give the most basic and most obvious guidance of directing attention to the extent of the harm risked and the probability of the harm occurring.

justification defenses, we tolerate a greater risk (probability X harm) if the effect of the risk is sufficiently desirable. The risks created by building a new factory might be justified by its productive potential but not justified if initiated to entertain the members of an explosives club. Whether any risk is justified by its purpose is a function of the relative values that society gives to the conflicting interests. Thus, each assessment of risk-creation requires an actor not only to make a complex judgment of probability and potential harm but also to balance competing community interests. An actor might find some guidance in whether such a risk in such circumstances has been tolerated in the past.[52]

Modern codes are not insensitive to the need to define the risks prohibited by the criminal law. The Model Penal Code, for example, includes in its definition of culpable risk-taking ("recklessness" and "negligence") the following:

> The risk must be of *such a nature and degree that, considering the nature and purpose of the actor's conduct* and the circumstances known to him, [its disregard/the actor's failure to perceive it] involves a gross deviation from *the standard of [conduct/care] that a [law-abiding/reasonable] person* would observe in the actor's situation.[53]

The nature and degree of the risk and the purpose for which it is undertaken are all taken into consideration. Further, these factors must be assessed in light of the community's standard of conduct.

But while the quoted provision accurately identifies the major factors that define criminal risk, it serves primarily to obscure the definition. To start, the quoted provision is not a definition of what will constitute *criminal risk-creation*. Rather, it is a definition of *culpable risk-taking*. The distinction is important. The definition does not define what risks are criminal; it does not define the real world risk-creation that is prohibited. Instead, it defines when an actor is culpable for taking a risk; it defines the mental risk-taking as to the existence of a circumstance or as to causing a result that makes the conduct blameworthy. The former issue—real world risk-creation—presents a rules of conduct issue: What is the kind and degree of risk of harm that an actor is prohibited from

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[52] But assumed knowledge of past "accepted" practice seems a weak reed on which to hang the notice called for by the legality principle (the notion that the state must place citizens on notice of a command before that command is legitimate). Further, to define an aspect of the rules of conduct by referring to "the standard of conduct [of] the [law-abiding/reasonable] person" is slightly circular. *See* MODEL PENAL CODE § 2.02(2)(c)-(d). No doubt the drafters assume that some shared understanding of "accepted" risks exists within the community. They may be right, but the law's reliance upon such an intuitive standard certainly ought to make us uncomfortable about whether this aspect of the rules of conduct adequately performs the notice function that the legality principle demands. On the other hand, no obvious alternative mechanism has as yet presented itself. The definition of criminal risk in a given instance is a complex matter that cannot (yet) be reduced to a more precise form. An actor's obligation under the rules of conduct is to try to discern "the standard of conduct [of] the [law-abiding/reasonable] person" and to avoid creating risks that, in light of this standard and the nature, degree, and purpose of the risk, are criminal.

[53] *Id.* (emphasis added).

creating?[54] The latter issue—mental risk-taking—presents a liability issue: When is an actor to be held blameworthy for "taking a risk" that his conduct violates the rules of conduct? The distinction is between creating a risk of causing a harm and taking a risk of violating a rule.[55] The Code defines what risk-taking is culpable but does not define what constitutes a criminal risk.

As a doctrine of liability, the provision performs well. It is properly sensitive to the subtle difficulties in assessing whether the actor's risk-taking is culpable. The decisionmakers must take account of "the circumstances known to [the actor]" and to place the law-abiding/reasonable person "in the actor's situation." That latter requirement in particular permits courts great latitude to individualize the objective standard in judging the actor's culpability.[56] Finally, the provision permits liability only if the actor's conduct is a "gross deviation" from the standard of conduct of the law-abiding/reasonable person. The "gross deviation" standard is designed to give actors some, albeit vague, margin of error in adhering to the "standard of conduct of the [law-abiding/reasonable] person." Together, these requirements are meant to assure, as the doctrines of liability should, that an actor is held criminally liable for an offense only if he reasonably could be expected to have avoided the violation. But by formulating the definitions to perform the liability function, the Code fails in its rule articulation function.

By mixing the two functions, the Code invites a similar confusion in its readers. The following passage by a thoughtful and respected scholar is typical of descriptions found throughout the literature:

> Criminal liability is frequently predicated on negligence, which is *conduct that creates an unreasonable risk of harm* to an interest protected by the criminal law (negligence as to result), *or an unreasonable though sincere*

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[54] There is no comparable risk-creation for violations not involving a prohibited result. Where the prohibition is defined only in terms of conduct in certain circumstances, the circumstance either exists or does not. One does not *create* a risk of a circumstance; one can only *take* a risk that a circumstance exists. That is, one can act in disregard (or ignorance) of such a risk of the existence of the circumstance. As the text notes, determining whether an actor has engaged in such mental risk-taking is part of the liability function.

[55] *See* Robinson, *supra* note 1, at 745-49.

[56] The commentary makes clear that "in the actor's situation" may be interpreted as broadly as the court chooses. It may include not only the objective circumstances of the actor's "situation" but also characteristics of the actor.

> The standard for ultimate judgment invites consideration of the "care that a reasonable person would observe in the actor's situation." There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.

MODEL PENAL CODE & COMMENTARIES § 2.02 cmt. 4 (1985). In this respect, the drafters stray somewhat from the spirit of the legality principle.

> *belief* that one's conduct is not conduct which, under another description, is proscribed by the criminal law (negligence as to conduct). Negligent homicide is an example of a crime based on negligence as to result—i.e., *the creation of an unreasonable risk of death* that in fact eventuates in a death. Bigamy is an example of a crime that can be based on negligence as to conduct, as (for example) in those cases where one *unreasonably believes* in the validity of a prior divorce. The Model Penal Code's definition of criminal negligence is representative: [quotation of Model Penal Code section 2.02(2)(d)].[57]

Note the interchanging of risk-creation and risk-taking. Both are seen as a form of the single concept of "negligence," rather than as applications of the two very distinct functions of rule articulation and liability assessment. If negligence is meant to refer to the liability function of assessing whether a violation is sufficiently culpable, then analogous culpability requirements exist for both circumstance elements *and result elements*, bigamy *and negligent homicide*. Just as the prosecution must show that the bigamist's belief in the validity of the prior divorce was unreasonable, so too must it establish that the killer's failure to perceive the criminal risk of causing death was unreasonable. The difference between risk-creation and risk-taking is not related to the difference between result elements and circumstance elements, as the quoted passage suggests, but rather to the difference between the rule articulation function—defining the risks prohibited by the criminal law—and the liability function—defining the culpability that must accompany a violation before liability may be imposed.

Even if courts could dissect sections 2.02(2)(c) and (d) to extract the factors and analysis necessary to assess whether a risk is prohibited—the nature, degree, and purpose of the risk, and the community's balance of these as manifested in the standard of conduct of the law-abiding/reasonable person—the Code would fail in its function of defining the risks that are criminal. The quoted provision is contained in the definition of "recklessly" and "negligently." Thus, the dissection exercise is available only where the offenses criminalizing risk-creation use the terms "recklessly" or "negligently." This is sometimes the case, as in homicide.[58] But more frequently the Code defines risk-creation offenses as prohibiting a "substantial risk" or just a "risk" or a "danger" of a particular harm, using different phrases in different contexts.[59] The effect of this

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[57] Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law, in* CRIME, CULPABILITY, AND REMEDY 88-89 (Ellen F. Paul et al. eds., 1990) (emphasis added).

[58] A person is guilty of manslaughter "if he *recklessly* . . . *causes* the death of another human being." MODEL PENAL CODE §§ 210.1(1), 210.3(1)(a) (emphasis added). "A person is guilty of criminal mischief if he . . . *recklessly causes* another to suffer pecuniary loss. . . ." *Id.* § 220.3(1)(c).

[59] For example, the Code prohibits creation of a "substantial risk" of causing death (in § 211.1(2)(a), aggravated assault); creation of a "danger" of death or a "substantial risk" of death (in § 211.2, reckless endangerment); creation of a "substantial risk" of loss of entrusted property (in § 224.13); and creation of a "danger" of damage or destruction of a building (in § 220.1(2)(b), reck-

inconsistency is to exclude from the analysis of whether the actor has created a criminal risk the consideration of most factors deemed relevant by the Code drafters themselves: the nature, degree, and purpose of the risk, and the community's balance of these factors as manifested in the standard of conduct of the law-abiding/reasonable person. "Risk" might be taken to mean any risk; "substantial risk" might be taken to focus only on the degree of the risk (or possibly its nature). Nothing in the language suggests the need to assess the purpose of the risk-creation or the balance of competing interests.

The effect of the Code's failure to give guidance in defining criminal risks might seem minimized by the tendency of the Code to prohibit the most egregious risk-creation through offenses that require actual results, such as homicide. That is, if an actual result is required, we can avoid the problem of defining the mere risk of the harm that is criminal. But as most thoughtful readers have already discerned, requiring that the actual result have occurred does not avoid the need to determine whether the risk was criminal.[60] Defining reckless homicide (manslaughter) to require a death, for example, does not avoid the need to determine whether the actor's conduct in causing that death created a risk that was criminal. An actor might have caused the death through the creation of a risk that itself was noncriminal. To punish such an actor for manslaughter is to fail to distinguish him from the actor who caused a death by creating a risk that was itself criminal. This problem is the subject of Part V.A.

The need for clear guidelines in assessing the criminality of the risk is heightened by the human tendency to exaggerate the degree of a risk when it comes to fruition. The empirical literature reports this common phenomenon: persons significantly overestimate the extent of a risk if the risked result occurs.[61] This phenomenon may lead to liability for creating a criminal risk when in reality the created risk was not criminal. A death can occur even where the risk created is sufficiently low to be noncriminal. Yet, without a definition of criminal risk, how can this determination be made?[62]

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less burning or exploding). The Code prohibits the "risk" of causing terror or serious public inconvenience (in § 211.3, terroristic threats). Also prohibited are a "risk" of causing a "substantial risk" of death through restraint (in § 212.2(a), felonious restraint) and a "risk" of causing a catastrophe (in § 220.2(2), risking catastrophe).

60 The use of result offenses to punish criminal risk-creation not only fails to avoid the need to define criminal risk but also creates several other special problems. For example, the resulting array of overlapping offenses may define the prohibited risk differently. In some instances of overlap between result and risk-creation offenses, the conduct creating a risk is prohibited and punished only if the harm comes about, but whether the harm will occur is a fact that the actor cannot know at the time he engages in the conduct. *See* Robinson, *supra* note 1, at 748-49.

61 Baruch Fischoff, *Hindsight Does Not Equal Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288, 298 (1975).

62 Nor is it enough, as discussed above, that the definition of culpable risk-taking tells us whether the actor's risk-taking was culpable. Liability for manslaughter is appropriate only if the actor was culpable *and* the risk created in fact is prohibited. At the very least, the doctrine should distinguish

A better approach would give independent definitions of criminal risk and culpable risk-taking. Risk-creation offenses, then, could properly be defined to prohibit creation of a "criminal risk" of the specific harm, incorporating by reference the general formula. This would replace the current practice, which defines these offenses by using either undefined terms such as "risk" or "substantial risk" or by using culpability terms that drop the requirement that the prohibited risk actually be created.

Using the language of the Model Penal Code, one could construct a definition of criminal risk something like the following:

> An actor creates a "criminal risk" of a result or "criminally risks" a result when he creates a substantial and unjustified risk that the result will occur. A risk is substantial and unjustified if, given its nature, degree, and circumstances, its creation is a gross deviation from the standard of conduct of a law-abiding person.

One could construct culpability definitions, again using Model Penal Code language, as follows (remember that the culpable risk-taking terms must be defined with respect to both result and circumstance elements):

> A person acts "recklessly" with respect to an element of an offense when he consciously disregards a risk that the circumstance exists or that his conduct will cause the result, as the case may be. (Same second sentence as in Code.)
>
> A person acts "negligently" with respect to an element of an offense when he should be aware of a risk that the circumstance exists or that his conduct will cause the result, as the case may be. (Same second sentence as in Code.)[63]

The only real change to the Code's current culpability definitions is the deletion of the phrase "substantial and unjustified" modifying the term "risk" in the first sentence of each definition. The substantiality and justifiability of the risk are matters of concern in defining criminal risk-creation, but they add nothing to the definition of culpable risk-taking that is not already covered by the culpability definitions' call, in the second sentence, to judge the blameworthiness of the actor's disregard or unawareness of the risk:

> The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, [its disregard/the actor's failure to perceive it] involves a gross deviation from the standard of [conduct/care] that a [law-abiding/reasonable] person would observe in the actor's situation.[64]

Presumably, juries more easily will find "a gross deviation" where the risk is more "substantial" or more "unjustified."

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reckless homicide convictions where the risk created is criminal from those where it is not. The current doctrine's failure to do so is examined more closely in Part V.A.

[63] *See infra* text accompanying note 64.

[64] MODEL PENAL CODE § 2.02(2)(c)-(d).

To illustrate the use of these terms, manslaughter might be defined as follows:

> An actor commits manslaughter if, with recklessness as to causing the death of another human being, he creates a criminal risk of such death and death results.

Of course, one might avoid such stilted definitions by having a general principle that liability for a substantive offense of risk-creation (as opposed to an inchoate offense) requires proof that the criminal risk in fact was created. With such a principle, which courts might supply even in the absence of a statutory provision, and a definition of a criminal risk, one could simply define manslaughter as "recklessly causing the death of another human being."

To conclude, my claim here is not that the Model Penal Code drafters are insensitive to factors important to the definition of criminal risk-creation or culpable risk-taking. That is, general formulae seem the best one can provide for guidance on these issues. My claim here is that by failing to see that the issues of risk-creation and risk-taking are distinct, the Code's general formula is less likely to effectively perform either task. (The discussion here focuses on the difficulties that such a mixture of function creates for the rule articulation function by failing to provide a definition of criminal risk. The difficulties that this mixture creates for the grading function by using culpability terms to define prohibited risks are examined in Part V.A.)

IV. The Doctrines of Liability: When Is a Violation of the Law's Commandments to Be Punished?

Recall that the liability function of criminal law doctrine arises from the special condemnatory nature of criminal law, which requires that criminal liability be based upon blameworthiness. If an actor's violation is blameless, he ought to be free from liability even though he may well have brought about the prohibited harm or evil. If an actor's violation is blameworthy, he ought to be liable. Does current doctrine impose liability on blameworthy violations and avoid liability for blameless violations? The legal literature contains a number of criticisms of the doctrine for a perceived failure in this regard. Two well-known examples are the lack of a general defense for a reasonable mistake as to the lawfulness of one's conduct and continued use of the felony murder rule. A functional analysis suggests some less obvious failures, both in setting culpability requirements and in formulating excuse defenses.

A. Elevating Base and Aggravation Culpability Requirements as if They Were Criminalization Mental States: Improperly Limiting Attempt Liability

An earlier discussion in Part I.B described four distinguishable

kinds of culpability requirements: present conduct intention, future conduct intention, present circumstance culpability, and future result culpability.[65] Only the second is used as a criminalization mental state in cases of incomplete conduct toward an offense. The failure to see that the future conduct intention in attempt plays a different function than the other culpability requirements in an incomplete attempt has helped confuse many courts and code drafters into treating all attempt culpability requirements as if they perform the rule articulation function. It is true that this "purpose" or "intention" requirement is an appropriate additional requirement—beyond that required by the substantive offense—but it does not follow that this same elevated level of culpability should be applied to all other culpability requirements of attempts, which may serve other functions.

Consider a prosecution for attempted murder. Must it be the actor's conscious object (purpose) to cause the death, or is it sufficient, as it is for murder liability, that the actor know that his conduct is practically certain to cause the death? It is true that the actor's purpose *to complete the conduct* that would cause the death must be clear. Without this intention, the justification for criminalizing the otherwise innocent conduct disappears. But why should the minimum culpability requirements of the object offense—such as the culpability as to causing the death, a future result culpability—be elevated to purpose? Similarly, in a prosecution for attempted statutory rape,[66] must the actor have as his purpose that his partner is underage, or is it enough that he is aware that his partner might be underage (recklessness as to underage), as would be sufficient for liability for the completed offense? Clearly, his intention to go through with the intercourse, his future conduct intention, must be shown. In its absence there is no justification for criminalization. But why is recklessness as to age, a present circumstance culpability, no longer adequate in establishing the minimum culpability for liability?

The clumsiness of the common law's mental elements scheme may explain why the common law could not make the distinction between a criminalization mental state and a culpability mental state. Attempt was said to be a "specific intent offense."[67] It thus required more in the way of proof of culpable state of mind than a "general intent offense," where it was thought that the actor's intention could be inferred from his conduct. But the general intent/specific intent offense scheme, which did not distinguish between mental states as to different elements of the offense, made it impossible to require purpose as to completing the offense conduct while requiring mental states of less than purpose as to the elements of the substantive offense. Thus, once it was agreed that attempt

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[65] The present conduct intention requirement is somewhat superfluous. *See supra* p. 864.

[66] *See, e.g.*, State v. Davis, 229 A.2d 842 (N.H. 1967) (affirming a conviction for attempted rape of a "woman child under the age of 16 years").

[67] *See, e.g.*, People v. Trinkle, 369 N.E.2d 888, 892 (Ill. 1977).

had a purpose requirement, which it surely had (the purpose to engage in the conduct constituting the substantive offense), it followed that this same purpose requirement applied to all offense elements.

The Model Penal Code replaces the common law "offense analysis" notion that each offense has a single culpability requirement with "element analysis."[68] Section 2.02(1) expressly requires a showing of culpability "with respect to *each material element of the offense*."[69] Yet it appears to hold to the common law rule that attempt liability requires the actor to be purposeful as to a result element even if the substantive offense attempted requires less. The commentary explains:

> The general principle is . . . that the actor must affirmatively desire to engage in the conduct or *to cause the result that will constitute the principal offense*.[70]

But why should this be the rule? Assume an actor places a bomb in a Selective Service office knowing it will kill the persons therein. He does not want to kill such persons—his object is only to destroy the building—but he knows that when he pushes the detonator the people are practically certain to be killed. If he is caught by police after the explosion causes deaths, he will be liable for murder. If he is caught just before he presses the detonator, he will not be liable for attempted murder. He will not be liable even though the prosecution can prove beyond a reasonable doubt that it was his purpose to engage in the conduct constituting the offense, pushing the detonator, and can prove that he has the culpability required for murder, knowledge that his conduct is practically certain to cause deaths. He may be liable for other offenses but will escape liability for attempted murder because it is not his *conscious object* to cause death.

The same principle would elevate culpability as to a circumstance element to the same "purpose" required as to future conduct, just as it elevates culpability as to a result element. Under this approach, an actor caught in bed on the verge of committing statutory rape will be free from

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[68] *See generally* Robinson & Grall, *supra* note 11.

[69] MODEL PENAL CODE § 2.02(1) (emphasis added).

[70] MODEL PENAL CODE & COMMENTARIES § 5.01 cmt. 2 (emphasis added). Although modern codes have shifted to "element analysis," in which different culpability requirements may apply to different elements of the same offense, many modern courts and codes have followed the common law rule that attempt requires purpose as to the elements of the object offense. In *People v. Trinkle*, for example, after being refused further service, the resentful defendant fired a shot into a tavern, wounding a patron within. 369 N.E.2d at 889. The court affirmed a reversal of the defendant's conviction for attempted murder because, although murder required only "knowing" (or sometimes less) as to causing death, attempted murder required a specific intention, or purpose, to kill. The court reached this result despite the presence of an attempted murder statute that explicitly required only that the actor "*knows* [his] act creates a strong probability of death or great bodily harm." *Id.* at 890 (emphasis added). The court felt bound by the common law rule that "attempt is a specific intent offense" and attempt liability requires not only that the actor intend to engage in the conduct constituting the substantive offense but that the actor intend the prohibited result and the required circumstances of the substantive offense.

attempt liability even if he is aware that his partner may be underage and his purpose is clearly to engage in intercourse. To be liable for the attempt, it must be his "purpose" that his partner is underage.[71] Whether the law is wise to limit attempt liability in this way is questionable.[72] (While nothing on the face of the Model Penal Code's incomplete conduct provision would suggest a different rule regarding elevation of culpability as to a result from that as to a circumstance, the Code's commentary can be read to suggest that culpability as to a circumstance element need not be elevated.)[73]

The better approach is to see the criminalization mental state, such as the actor's future conduct intent to engage in the conduct constituting

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[71] Unlike the definitions as to conduct or results, "purpose" is defined with regard to a circumstance to require either a desire or an awareness of circumstances. *See* MODEL PENAL CODE § 2.02(2)(a)(ii) ("he *believes* or hopes") (emphasis added). Thus, "purpose" as to a circumstance requires no more than does "knowing" as to a circumstance.

[72] There is some authority for a contrary view. In *State v. Galan*, for example, the defendant was charged with attempted trafficking in stolen property. The substantive offense required only recklessness as to the property being stolen but the defendant claimed that the indictment was defective because "an attempt . . . requires a specific intent which is incompatible with a reckless state of mind." 658 P.2d 243, 244 (Ariz. Ct. App. 1982). The attempt statute was similar to the Model Penal Code provision, except for the substitution of the term "intentional" for "purposeful," a common grammatical alteration. The court concluded:

> A common sense reading of the provision leads to the conclusion that the words "*intentionally* engages in conduct" refers, in this case, to the actions that make up trafficking like buying property . . . and that the words "*acting with the kind of culpability otherwise required for the commission of an offense*" requires only that the acts be accompanied by a reckless state of mind as to the circumstances attending the status of the property. A contrary conclusion would mean that the words "*acting with the kind of culpability otherwise required for the commission of an offense*" are superfluous.

Id. at 244-45 (alteration in original). (Deleted from the quoted passage is dicta suggesting that "intentionally engages in conduct" might also require proof that the actor intended to resell the property. This might well be required by the substantive offense of trafficking but it is hard to see such a requirement from the "engages in conduct" language.)

Some jurisdictions take a similar approach with respect to the culpability required as to a result. They require only that level of culpability as to causing a result required by the substantive offense; no elevation of culpability as a result is required for attempt. Indeed, some jurisdictions drop the Model Penal Code's "purpose" or belief language, leaving only the requirement that the actor be "acting with the kind of culpability otherwise required for commission" of the offense. MODEL PENAL CODE § 5.01(1). As the Utah Supreme Court concluded in *State v. Maestas*:

> [R]egardless of any requirements which the common law may impose concerning [specific intent in] "attempt" crimes, Utah law requires only "the kind of culpability otherwise required for the commission of the [completed] offense." Thus, there can be no difference between the intent required as an element of the crime of attempted first degree murder and that required for first degree murder itself.

652 P.2d 903, 904 (Utah 1982).

[73] *See* MODEL PENAL CODE & COMMENTARIES § 5.01(1) cmt. 3 (Tent. Draft No. 10, 1960). (This unofficial revision in the commentary has not been noticed by many jurisdictions that use the Code's attempt provision.) But in support of elevation of culpability as to circumstance elements, see *supra* text accompanying note 69 (requiring a positive desire "*to engage in the conduct* or cause the result *that will constitute the principal offense*"). (And recall the Code's broad meaning of "conduct" to include the attendant circumstances of the conduct, *e.g.*, "having intercourse with a person under 16.").

the offense, as distinct from the culpability mental states required by the substantive offense, such as the future result culpability toward causing a resulting homicide or the present circumstance culpability as to the partner's age in statutory rape. The actor's future conduct intention is central to the definition of what constitutes a criminal attempt; the actor must have as his *purpose* to engage in the conduct that would constitute the offense. There is no apparent reason, however, why the culpability requirements of the substantive offense, which serve the liability function, must be elevated to purpose. The culpability requirements that adequately serve the liability and grading functions for the substantive offense ought to be adequate to serve those functions for attempt liability. If negligence as to a sexual partner's age is sufficient to establish culpability for statutory rape, why not for attempted statutory rape? If knowing as to causing a death is adequate for murder, why not for attempted murder?

One dramatic effect of the elevation-to-purpose approach is that it can bar liability altogether for conduct designed to create a prohibited risk of harm, specifically where the actor's attempt to create the risk is foiled. Consider a hypothetical: an actor is caught just as he is about to discharge toxic chemicals near a school soccer field, knowing the chemicals may cause the death of one or more of the school children. He cannot be liable for reckless homicide because no one is actually killed. He cannot be liable for endangerment because he had not yet created a risk of death or serious bodily injury (and did not believe that he had yet created such a risk).[74] One would think, however, that where we are lucky enough to catch him before he creates the risk, he ought to be liable for attempted endangerment. Similarly, where an actor is caught just before he buries toxic waste near the town reservoir and knows that, once completed, his conduct will create a risk of catastrophe, he ought to be liable for an attempt to commit the offense of risking catastrophe.[75] But under the elevation-to-purpose approach, neither actor can be held liable.[76] While the actor's awareness that the planned conduct creates the prohibited risk is sufficient for full offense liability if the risk is created, only purpose is adequate for liability where only attempt is charged. Because the actor's objective is to avoid costly disposal fees, rather than to endanger people, the actor is protected from attempt liability.

The drafters defend the Code's position by arguing that liability for attempts to create a prohibited risk would spread liability too far.[77] But

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74 *See* MODEL PENAL CODE § 211.2.

75 *See id.* § 220.2(2).

76 Presumably, some regulatory offense governing the handling of toxic chemicals will impose some liability, but this hardly recognizes the seriousness of the violation.

77 The approach of the Model Code is not to treat such behavior as an attempt. Instead the Code creates a separate crime, a misdemeanor, for recklessly placing another person in danger of death or serious bodily injury. The Institute's judgement was that the scope of the criminal law would be unduly extended if one could be liable for an attempt whenever he recklessly or

why the actual creation of the risk ought to be determinative of liability is hard to understand. Successful and unsuccessful attempters have the same subjective culpability (and probably the same dangerousness). Indeed, the Code drafters use precisely this argument to support their view that the absence of resulting harm generally ought not reduce the grade of an offense; attempts generally are to be graded the same as completed offenses.[78] Yet, here, under their definition of attempt, the actor's failure to successfully create the intended risk does even more than reduce the grade of the violation—it exempts the actor from liability altogether.[79]

The discussion so far has focused on the most common case of incomplete conduct toward an offense. Is the analysis different for those cases where attempt liability is imposed when the actor's conduct is complete but the offense is factually or legally impossible? Where the actor's conduct is complete, no future conduct intention need be shown. We have the actor's conduct as evidence of his intention to engage in the conduct constituting the offense. Thus, even the analogy to the future conduct intention required in incomplete conduct cases does not explain a wish to elevate the required culpability above that required as to the circumstance and result elements of the substantive offense.

Reconsider the draft board terrorist who plans to bomb the draft board *knowing* that the bomb will kill the security guard but not *wanting* to kill the guard. If his bomb kills the guard, he will be liable for murder; knowing as to causing death is sufficient. As noted above, if he is caught just before he triggers the bomb, he will not be liable for attempted murder because his knowing culpability is insufficient; attempt liability here requires that he be purposeful as to the killing. Consider the case where he triggers the bomb but the explosive does not function due to moisture. His conduct toward the offense is complete—we know for certain that he was willing to carry the offense through to completion—but the result did not come about. Ought the actor escape liability for attempted murder because of the factual impossibility of completion?

All would agree that he ought not escape attempt liability. Even the Code agrees with this result. It creates an exception to the elevation-to-purpose requirement for cases in which the actor has completed his conduct but the result does not occur. Model Penal Code section 5.01(1)(b) provides that an actor is guilty of attempt if,

> when causing a particular *result* is an element of the crime, [he] does or

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negligently created a risk of any result whose actual occurrence would lead to criminal responsibility. While it was believed that the reckless creation of risk of death or serious bodily harm was grave enough for general coverage, even for this behavior misdemeanor penalties seemed more apt than the severer sanctions attached to felony attempts.

MODEL PENAL CODE & COMMENTARIES § 5.01 cmt. 2 (footnotes omitted).

[78] MODEL PENAL CODE § 5.05(1).

[79] Also note that such attempt liability is limited to those few instances in which the Code creates a substantive offense that punishes an actor for causing or risking a specified result. Result elements typically appear only in homicide, personal injury, and property damage offenses.

> omits to do anything with the purpose of causing or *with the belief* that it will cause such result without further conduct on his part.[80]

Such a reduction in the minimum culpability as to result from purpose to knowing is justified, in the drafters' view, because where the actor's conduct is complete,

> the manifestation of the actor's dangerousness is just as great—or very nearly as great—as in the case of purposive conduct. In both instances a deliberate choice is made to bring about the consequence forbidden by the criminal laws, and the actor has done all within his power to cause this result to occur.[81]

Some courts have reached the same conclusion and have argued that even the common law's specific intent requirement might be satisfied by such a belief that the result will occur.[82]

But the exception does not save the Code's provision from the criticisms voiced above. It does avoid elevation in the narrow case of substantive offenses, like murder, where knowledge as to causing a result is required and the conduct is complete. It does not, however, avoid the questionable results that occur where the actor's conduct is incomplete. The draft board bomber who is caught just before he detonates the bomb still escapes liability for attempted murder. The knowing culpability required for murder is still elevated to purpose for attempted murder.

Nor does the Code's exception avoid elevation and improper results where the substantive offense requires less than knowing as to causing a result. Consider the case of the toxic dumper who completes his conduct in dumping the chemicals but finds that suspicious investigators have substituted a similar looking nontoxic chemical. If the actor knows that his conduct would create a risk of death, then he might be liable for attempted endangerment under the Code's special rule (only knowing is required as to a result for completed conduct attempts). But assume that the actor is only reckless as to causing death. This is sufficient for the offense of reckless endangerment, but the Code will not permit liability for attempted reckless endangerment. This is so even though the actor has the culpability required for the substantive offense and has completed the conduct required for the offense. He cannot be held liable because the Code elevates the culpability requirement for attempt over that required by the substantive offense.

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80 MODEL PENAL CODE § 5.01(1)(b) (emphasis added). The Code's commentary notes: "Thus when the charge is attempted murder or assault with intent to kill, it is error to permit conviction on a finding of reckless disregard for human life or intent to inflict grievous bodily harm." MODEL PENAL CODE & COMMENTARIES § 5.01 cmt. 2.

81 MODEL PENAL CODE & COMMENTARIES § 5.01 cmt. 2.

82 *See, e.g.*, People v. Krovarz, 697 P.2d 378, 383 (Colo. 1985). The *Krovarz* court upheld a conviction where a psychologically unstable defendant attempted robbery with a putty knife. The court, citing the Model Penal Code section 5.01(1)(b) commentary, concluded, "We agree with [the Model Penal Code] reasoning; a knowing attempt to attain a proscribed result is a sufficient culpable mental state to justify imposition by the legislature of attempt liability." *Id.* at 382.

It is true that there cannot be an "accidental attempt," in the sense that to "attempt" an offense one must intend to complete the conduct that would constitute that offense. One must have a future conduct intent. There is, however, such a thing as an attempt to cause an "accident," in the sense of an attempt to engage in conduct that would create the opportunity for an accident, that is, conduct that would create a risk. As long as the law is careful to require a conscious object to engage in *the conduct constituting the offense*, there seems little reason not to punish attempts to create risks and attempts that create risks.

The special intention requirement quite appropriately required in cases of incomplete conduct attempts is distinct from the other culpability requirements in such cases and has no application where the conduct is complete. No greater culpability than that required by the substantive offense ought to be required for attempt liability.[83]

B. Obscuring the Voluntariness Requirement's Shared Liability Function with Excuses: Distorting the Involuntary Act Defense

The voluntariness requirement typically is classed as part of the actus reus of each offense, as Part I.A noted.[84] Recall that most aspects of the actus reus serve a rule articulation or a grading function, describing the harm or evil of the offense and its seriousness. Functionally, the voluntary act requirement, or "involuntary act defense," is analogous to the criminal law's system of excuses, serving the liability function. Certainly,

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[83] This position is not insensitive to the problems inherent in imposing liability where the actor has not gone far toward committing the offense. The less the actor has done, the harder to meet the culpability requirements. As a practical matter, a future conduct intention is harder to prove than a present conduct intention. Where the actor's offense conduct is incomplete, the prosecution has a significant burden in proving the actor's future conduct intention. Where the offense conduct is complete, the prosecution's task is easier. In completed conduct attempts, the required criminalization mental state is transformed from a burdensome future conduct intention to an almost pro forma present conduct intention. No special elevation of the object offense's culpability requirements is needed to reach this sliding scale between the extent of conduct and the importance of proving culpability.

[84] Voluntariness might be thought to be more akin to mens rea than to actus reus elements. Culpability elements at least concern the issue of accountability for harm caused; objective elements more clearly define the nature of the harm or evil. But this characterization is problematic as well. Under it, for example, an actor's involuntariness might be denied as a defense to a strict liability offense on the ground that proof of culpability is not required. *See, e.g.*, Roger Clark, *Accident—Or What Became of* Kilbride v. Lake*?*, *in* ESSAYS ON CRIMINAL LAW IN NEW ZEALAND 65 (Roger Clark ed., 1971) (discussing denial of involuntariness defense in strict liability case and arguing inappropriateness of such denial). But while public policy may support the imposition of strict liability for an offense, it does not follow that it supports the imposition of liability on involuntary actors, who are blameless under general principles of excuse. General excuses remain available to offenses of strict liability. And involuntariness, like the general excuses, ought similarly be available, without regard to the culpability requirements of the particular offense definition. The doctrine can make this point clear by characterizing involuntariness as a general excuse rather than an offense element.

the cases dealt with under the voluntary act requirement are at the extreme of the lack-of-volition spectrum. Such involuntariness represents the most nonvolitional form of conduct and is thus the most convincing ground for excuse, but it is not functionally different from other traditional conditional excusing conditions dealt with under the excuse defenses of insanity, immaturity, duress, and involuntary intoxication.

Like the general excuse defenses, the involuntariness defense is not unique to the particular offense at hand. Involuntariness does not mean the absence of the harm or evil of the offense, as does absence of other objective elements. When an actor assaults another during a seizure, our conclusion is not that the assault is not harmful and regrettable (indeed, civil liability may be permitted), but rather that the assault is undesirable but that condemnation is not appropriate in light of the involuntariness of the conduct. Nor is involuntariness consistent with a normal actor with normal capacities. It suggests either abnormal conduct or an abnormal actor, as do the conditions of excuse defenses. The other elements of an offense, in contrast, are consistent with an actor of normal capacities.[85]

The failure of current doctrine to recognize the functional similarity of the voluntary act requirement and the general excuse defenses has resulted in distortion in its formulation of the former. Because it is not conceptualized as an excuse, the voluntary act requirement has escaped significant limitations routinely placed on excuse defenses. The two most important are the requirement of a specific cause of the lack of control (a specific "disability") and the requirement that the disability cause a certain degree of control dysfunction.

As to the first—a specific disability requirement—the traditional excuses, such as insanity, duress, and involuntary intoxication, require proof that the actor's lack or impairment of control comes from a specific identifiable cause: mental illness, physical coercion, or intoxication, respectively. An involuntary act defense, in contrast, is permitted without regard to the cause of the involuntariness. Anything that causes an actor to perform a criminal act that "is not a product of [his or her] effort or determination" will qualify for the defense. The absence of a specific disability requirement might be justified on the ground that the lack of control in many involuntary act cases is so complete and dramatic that no other requirement is needed to assure blameworthiness. It is irrelevant whether the muscular movement comes from a grand mal seizure or

[85] One could maintain the conceptual similarity between involuntariness and other excuses by treating all excuses as negative elements of each offense. Indeed, the Model Penal Code seems to move toward this approach when it defines "elements of an offense" to include the absence of all general defenses, including excuses. MODEL PENAL CODE § 1.13(9)(c). However, such an approach hides the important conceptual distinctions between elements of an offense definition and general defenses. *See* Robinson, *supra* note 29, at 264-73.

from a reflex action. Such total lack of volition is an obvious and convincing ground for exculpation. No additional requirement is necessary.

But the absence of a disability requirement has the collateral effect of broadening the defense to cases beyond instances of complete lack of volition. That is, the freedom from a specific disability requirement gives the involuntariness defense a special role in the system of excuses as the catchall excuse, used where the actor's control is impaired by a disability other than one of those recognized in the traditional excuse defenses.[86] Hypnotism, for example, is not a recognized form of mental illness, defect, unlawful force, intoxication, or any of the other disabilities or sources of disability recognized by traditional excuse defenses. If an actor seeks an excuse for his conduct under hypnosis, he must invoke the involuntary act defense for which no specific disability is required.

This catchall use of the involuntariness defense is common where the actor's control is admittedly impaired but decidedly less impaired than the complete or nearly complete lack of control of a grand mal seizure or a reflex action. This use is problematic. Available evidence suggests that hypnotism, for example, can cause significant impairment of control under certain circumstances for certain persons, but not loss or even near loss of volition.[87] Similarly, somnambulism ("sleepwalking") has an effect in impairing an actor's control but does not render his conduct involuntary in the absolute or near absolute sense.[88] This extension of the involuntariness defense from cases of loss to cases of mere impairment of control is not limited to clever defense counsel or sympathetic courts. The Model Penal Code recognizes acts during both hypnotism and somnambulism as conclusively *involuntary* acts despite the lack of

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[86] In Bradley v. State, 277 S.W. 147 (Tex. Crim. App. 1925), for example, the defendant was startled from sleep and in a somnambulistic state began randomly shooting into a dark room, killing his companion. The court held that the defendant lacked "conscious volition" and therefore could not be held liable. For other examples of this extended use of the involuntariness defense to cases of impairment, see Regina v. Charlson, [1955] 1 W.L.R. 317 (Chester Assizes) (acquitting on defense of automatism defendant who suffered from a cerebral tumor that gave rise to outbursts of impulsive violence); People v. Newton, 87 Cal. Rptr. 394, 402, 405 (Cal. Ct. App. 1970) (allowing complete defense to charge of criminal homicide based on physical injury causing action without awareness); Fulcher v. State, 633 P.2d 142, 145-47 (Wyo. 1981) (holding that blow to head producing "traumatic automatism," a condition affecting ability to control conduct and to perceive environment, is a defense).

[87] Conduct under hypnosis typically is not robotic, as is popularly thought, yet nonetheless can be odd and out of character. *See, e.g.*, ERNEST R. HILGARD, HYPNOTIC SUSCEPTIBILITY 6 (1965) (stating that the change in state under hypnosis is always relative, rather than absolute; thus the hypnotized subject has the ability to initiate action, such as delivering a speech); PAUL SCHILDER, THE NATURE OF HYPNOSIS 104 (Gerda Corvin trans., 1956) (asserting that the hypnotized subject is not a passive tool in the hypnotist's hands but retains his will and personal attitudes); GLANVILLE WILLIAMS, CRIMINAL LAW § 250 (2d ed. 1961) (citing evidence that the hypnotized actor may not be under complete control of the hypnotist and that the hypnotized actor's ego ideal exercises continuous control over relations). For a more detailed discussion of hypnosis as an excuse, see 2 ROBINSON, *supra* note 10, § 191.

[88] 2 ROBINSON, *supra* note 10, § 172(c).

evidence that such disabilities cause such loss of control.[89]

This expansion of the involuntariness defense from cases of loss to cases of mere impairment of control is not itself objectionable. The degree of impairment in such cases may not be severe but nonetheless may be sufficient to merit an excuse. And such impairment may result from disabling conditions that are as empirically confirmable as the traditional excuse disabilities of involuntary intoxication, insanity, and duress. Thus, this expansion of the defense may be useful because it generates a proper result in cases of blamelessness that otherwise would be denied a defense.[90]

However good the motivation, the characterization of volitionally impaired conduct as involuntary is problematic. Under traditional excuse principles, an excuse for impaired control short of involuntariness requires an inquiry into whether the degree of impairment is enough to render the actor blameless. This inquiry examines the actor's situation and compares the actor's conduct to that of the reasonable person in the same situation. The duress defense, for example, requires not only that "the actor engaged in the conduct charged to constitute an offense because he was coerced to do so," but also that "a person of reasonable firmness in [the actor's] situation would have been unable to resist [the coercion]."[91] The excuses of insanity and involuntary intoxication similarly require the jury to assess the *degree* of impairment of volition in the case at hand and to determine whether it is sufficient to support an excuse. The jury must find that the actor, at the time of his conduct, lacks "*substantial capacity* . . . to conform his conduct to the requirements of law." The standard of "substantial" capacity is intentionally "open-ended" in order to induce the jury to use its own intuitive sense of justice to determine whether the degree of impairment was enough to merit an excuse.[92]

To irrebuttably presume exculpating involuntariness in the absence of this inquiry into the extent of the impairment, as the Model Penal Code does, is to risk granting undeserved excuses. In cases of hypnotism and somnambulism, or wherever disabilities impairing control are treated as instances of lack of control, an actor may fail to meet the standard of impairment that a jury would require for excuse yet nonetheless gain an excuse if it is brought within the involuntary act defense. Indeed, whenever the voluntary act requirement is the claimed basis for a de-

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89 MODEL PENAL CODE § 2.01(2)(b)-(c).

90 A hypnotic state can serve the purposes that a disability typically serves. The presence of a hypnotic state can be scientifically confirmed by a change in brain wave patterns. And, typically, the hypnosis is caused by another person, making the abnormality particularly effective in the blame-shifting function. Like the coercer in duress, the hypnotist presents an easy recipient for the blame.

91 MODEL PENAL CODE § 2.09(1).

92 MODEL PENAL CODE & COMMENTARIES § 4.01 cmt. 3.

fense, it creates the potential for improper exculpation if the actor's control is only impaired, not lost.

One could avoid these difficulties by recognizing that the voluntariness requirement serves the same liability function as the excuse defenses and imposes analogous requirements. If volition is not lost but impaired, the doctrine ought to demand the same inquiry into degree as do the excuse defenses. This can be done by adopting a new excuse of *impaired consciousness*,[93] for use in cases short of involuntariness, where the disability causing the impairment is other than one of the disabilities recognized by a traditional excuse.[94]

The central point here is that where an actor seeks excuse on a claim that he lacked adequate ability to control his conduct, the jury ought to inquire into the actual extent of the impairment to determine whether it is enough to render him blameless for his violation. The failure to include this basic requirement of excuse defenses in the formulation of the voluntary act requirement is consistent with a failure to see that these two aspects of criminal law doctrine in fact perform the same function and properly should have analogous requirements. This failure also creates procedural problems. Treatment of the voluntary act requirement as a universal actus reus element, rather than as an excuse defense, complicates the allocation of the burdens of proving the issue. Most jurisdictions allocate the burden of offense elements to the state but may have the defendant carry the burden for defenses. Thus, while voluntariness is functionally similar to the excuse defenses, the state is likely to be given the burden of proving voluntariness.[95] Indeed, Supreme Court case law

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93 Such an excuse has been proposed by Glanville Williams for slightly different reasons. *See* WILLIAMS, *supra* note 87, § 157.

94 The defense provision might look something like the following:

Impaired Consciousness. An actor is excused for his conduct constituting an offense if,

(1) as a result of any physiologically confirmable disease or defect not specifically recognized or rejected as a basis for exculpation by another excuse,

(2) the actor

(a) does not perceive the physical nature or foresee the physical consequences of his conduct or does not know his conduct is wrong or criminal [lacks substantial capacity to appreciate the criminality/wrongfulness of his conduct], or

(b) is not sufficiently able to control his conduct so as to be justly held accountable for it [lacks substantial capacity to conform his conduct to the requirements of law].

95 The conditions supporting any of the general excuses are statistically rare; the actor has engaged in admittedly wrongful conduct, and the facts supporting the defense are uniquely within the knowledge of the defendant. Thus, a jurisdiction may wish to give the defendant the burdens of proof on general excuses. In contrast, offense elements are in issue in every case, and proof of the actus reus elements traditionally is required to establish that the actor has caused a societal harm, a burden traditionally and appropriately placed on the state. Allocation of the burdens of proof for excuses to the defendant is common. *See, e.g.*, 2 ROBINSON, *supra* note 10, §§ 173 nn. 6-7, 176 nn. 8-9, 177 nn. 4-5, 182 nn. 3-4. *See generally* Robinson, *supra* note 29, at 243-64. The failure to distinguish involuntariness from the offense elements makes inappropriate allocating the burden to prove involuntariness to the defendant. Regarding the burden of persuasion, compare People v. Furlong, 79 N.E. 978, 983 (N.Y. 1907) (placing burden of persuasion on defendant) and State v. Caddell, 215 S.E.2d 348, 363 (N.C. 1975) (determining that defense of unconsciousness (or automatism) is affirm-

may require this allocation if voluntariness is conceived of as an offense element.[96]

V. The Doctrines of Grading: How Much Punishment Is to Be Imposed for a Violation?

A functional analysis suggests some failures of current doctrine to properly grade violations. One kind of error is misformulation of grading because of a failure to see the function the formulation performs. The subjective definition of criminal risks, for example, gives liability treatment (focusing on an actor's belief that a risk is created) to a grading issue (whether the prohibited risk actually is created). A more common difficulty is the tendency of current doctrine to overlook the relevance to grading of factors that set the requirements for criminalization or liability. Sometimes the doctrine sees such factors as relevant to grading but does an unsystematic and incomplete job of varying grade with changes in the factors, as with the seriousness of the harm or evil or the actor's level of culpability. In other instances, as with causation, complicity, and excuses, the doctrine more generally fails to see the relevance of the factors to their grading function.

A. Mixing Liability and Grading by Using Culpability Terms to Define Prohibited Risks: Aggravation of Grade for Risk-Creation in the Absence of a Criminal Risk

Part III.D described the Model Penal Code's failure to define the risks that are criminal. Instead, the Code frequently defines risk-creation offenses by using the culpability terms "recklessness" and "negligence." Manslaughter is "recklessly causing a death"; negligent homicide is "negligently causing a death." Because culpability terms are necessarily subjective or individualized, the criminalization of these offenses is correspondingly subjective or individualized. This formulation is problematic because the Code punishment where a criminal risk actually is created is the same as where it is not created, where the actor only mistakenly believes it is created. Most jurisdictions take the view that the actual oc-

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ative defense and therefore burden rests with defendant) with People v. Hardy, 198 P.2d 865, 872 (Cal. 1948) (placing burden of persuasion on prosecution).

[96] The Supreme Court permits the burdens of production and persuasion to be shifted to the defendant for excuses but demands that they be allocated to the state for all offense elements. Patterson v. New York, 432 U.S. 197 (1977). To treat voluntariness as an offense element, then, is to foreclose the possibility of placing on the defendant either the burden of persuasion or the burden of production for involuntariness, no matter how strong a jurisdiction may judge the policy arguments in support of such allocation. This is particularly troubling given the use of the involuntariness defense as a catchall excuse, where the degree of impairment of control may be similar or even less than the degree of impairment of the traditional excuses, for which the burden of proof may be constitutionally shifted to the defendant. Conflicting expert opinions on matters of involuntariness, especially of the catchall type, common for many if not most general excuse defenses, make a beyond-a-reasonable-doubt standard difficult to meet.

currence of the offense harm or evil ought to increase the grade of liability. Thus, the actual creation of a criminal risk ought to be graded more seriously than where it is not actually created, all other things being equal.

Consider an actor who speeds at seventy-five miles per hour to avoid being late for an appointment and, in the process, kills a child who runs into the road. Assume that he unquestionably believes that he is taking a substantial and unjustified risk as to causing such a death, that given the circumstances known to him, his conduct is a gross deviation from the standard of care, as the definition of recklessness requires, and that his conduct causes the death. Under the Code, he is liable for manslaughter. Assume, however, that in fact his speedometer is broken and he is traveling only fifty-five miles per hour, the posted speed limit. His conduct admittedly creates a risk but no more of a risk than any other lawful driver creates on that road, a risk that is not, as an objective matter, a violation of the rules of conduct. Is liability for manslaughter still appropriate?

Criminalizing subjective risk-taking as to a result (the belief that one's conduct creates a prohibited risk) is not itself improper, for it is no different than punishing criminal attempts. Modern criminal law commonly bases liability upon an actor's externalization of her culpable state of mind. A difficulty arises here, however, because instances of criminalization of subjective risk-taking are not labeled or identified as instances of inchoate liability, but punished instead as full substantive offenses, as if the prohibited risk had actually been created. Under the Code, an actor is liable for manslaughter if he causes a death and, at the time of his conduct, has the required culpability as to the death (recklessness). The Code allows conviction for the full offense even if no criminal risk in fact is created.

If the actual harm or evil should aggravate liability—for example, by the actual creation of a prohibited risk—then liability for manslaughter is problematic. The actor's conduct is analogous to an impossible attempt. From his mistaken perspective, he satisfies the requirements of an offense by creating a criminal risk to pedestrians, but in fact he is wrong in his belief. If he is to be held criminally liable based upon his mistaken belief, by analogy to an impossible attempt, then only attempt liability is appropriate, not full liability for a substantive offense.

In defense of the Model Penal Code drafters, it is plausibly appropriate to punish an actor's subjective risk-taking the same as where the actor, with the same culpability, actually does create a prohibited risk. For example, while the Code is somewhat inconsistent in its implementation, it generally punishes attempts the same as the completed offense.[97] That is, the extent of the harm or evil attempted, but not its actual occur-

[97] *See* MODEL PENAL CODE § 5.05(1).

rence, affects the offense grade. The Code is not theoretically inconsistent, then, when it subjectivizes the definition of criminal risk.[98] Believing one is creating a prohibited risk and actually creating that risk are graded the same.

But if a jurisdiction disagrees with the Code's view that actual harm and actual risk are irrelevant, as a majority do, the code drafters in the jurisdiction must reverse the Code's provisions to reinstate the significance of the occurrence of the harm or evil. Thus, the Model Penal Code's provision grading attempt the same as the completed offense, for example, must clearly be dropped. And this typically is done.[99] But it is less obvious that the Code's treatment of criminal risk must be altered to eliminate its subjectivization of criminal risk. No jurisdiction that rejects the Code's disregard for resulting harm and evil also desubjectivizes, as it should, the Code's definition of criminal risk.

The problem is not unique to manslaughter. Whenever the Code uses an actor's culpability as the basis for liability, without requiring proof that the actor's conduct violates the rules of conduct, it potentially creates full substantive liability for an actor who simply believes, mistakenly, that his conduct is prohibited. The peculiarities go unnoticed because the rule articulation, liability, and grading doctrines are not distinguished. A purely subjective definition of criminal risk is obviously out of place in rules of conduct. It does not stand out in the current codes because the subjectivization is entirely appropriate in service of their liability function.

B. Incomplete and Unsystematic Use of Central Grading Factors

The most prominent distinction between the rule articulation and liability functions, on the one hand, and grading determinations, on the other, is between the yes-no nature of the former as compared to the gradient nature of the latter. Both rule articulation and liability determinations set minimum requirements. The grading determination must allot to each violator the appropriate amount on a spectrum of punishment. Yet, the doctrine frequently reverts to cutoff judgments for what in reality are issues of grading, resulting in part from the failure to distinguish grading from rule articulation and liability. Many of the issues of rule articulation and liability have an effect in assessing grade and, in that

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[98] Of course, the subjectivization of criminal risk is inconsistent with those aspects of the Code that do give significance to resulting harm, such as the grading difference between first degree felonies and attempted first degree felonies, *id.*, and between offenses that differ only in the resulting harm, such as that between manslaughter and reckless endangerment, *id.* §§ 210.3(1)(a), 211.2. *See generally* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES (forthcoming 1994) (discussing how the criminal law deals with the relationship between causing a prohibited harm and criminal liability).

[99] *See* Robinson, *supra* note 98 (manuscript at 4-7).

capacity, require formulations that call for continuous rather than cutoff judgments.

It may seem that the doctrine fails to make degree judgments with regard to some of the most important determinants of grade, such as the seriousness of the offense harm or evil or the actor's level of culpability. That is, each offense typically requires proof of a given minimum culpability level and minimum harm or evil. But, when viewed as a whole, rather than one offense at a time, the doctrine does somewhat better. Many offenses exist only to establish a higher grade of liability over a "lesser included offense." For example, the doctrine takes account of the degree of seriousness of a threatened harm by creating different offenses to punish different harms. Thus, intentionally causing a death is murder, a first degree felony; intentionally causing serious bodily injury is aggravated assault, a second degree felony; intentionally causing bodily injury with a risk of death (use of a deadly weapon) is a third degree felony; intentionally creating a risk of death or serious bodily injury is endangerment, a misdemeanor.[100]

On the other hand, degrees of seriousness in some forms of harm are ignored by modern codes. Destroying a twenty story apartment building with an explosive and slightly scorching the side of an abandoned house trailer are the same grade offense.[101] The actor who causes permanent brain damage by repeatedly beating a robbery victim with a hammer is liable for the same grade offense as one who swings at the victim with the hammer but misses and then flees.[102] If the only role of result elements is grading, and the Code reflects this role by altering grade according to some harms (as in personal injury), one wonders why the Code does not more systematically alter grade according to the seriousness of the offense harm or evil.[103]

The doctrine also uses culpability levels to grade offenses, usually keying on future result culpability. This is done in homicide, for example, where an intentional killing is murder, a first degree felony; a reckless killing is manslaughter, a second degree felony; and a negligent killing is negligent homicide, a third degree felony.[104] Similarly, knowingly causing a catastrophe is a second degree felony, while recklessly doing so is a third degree felony.[105]

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[100] MODEL PENAL CODE §§ 210.2, 211.1(2), 211.2.

[101] *Id.* § 220.1(1)(a), (4) (definitions of arson and "occupied structure").

[102] *Id.* § 222.1(1).

[103] The failure to recognize these differences in grading might arguably reflect a belief that actual resulting harm is irrelevant to the degree of liability; it is only the actor's subjective culpability that is relevant. But if that is the case, why does the Code include result elements at all? Why not define offenses in purely subjective terms? If subjective culpability is to be the central determinant of grade, the Code should generally take account of culpability level in grading. But, as the text notes, this is rarely done. *See generally* Robinson, *supra* note 98 (manuscript at 2).

[104] MODEL PENAL CODE §§ 210.2, 210.3, 210.4.

[105] *Id.* § 220.2.

But, again, varying the grade of a violation with the level of culpability as to the harm or evil is the exception rather than the rule. Few offenses other than homicide have their grade altered according to the actor's culpability level. This failure is particularly peculiar in the context of culpability as to a result since culpability as to result elements, like result elements themselves, serves *only* a grading function; thus one would expect the grading issue to be paramount in the drafters' minds. Yet, under most modern codes, an actor's culpability level as to causing a harmful result is frequently treated as irrelevant to the grade of his offense. The actor who starts a fire knowing that it will destroy another's building is liable for the same grade offense as one who is only reckless in doing so.[106] The actor who purposely creates a risk of catastrophe and the actor who recklessly does so are liable for the same grade offense.[107] The same is true for the actor who purposely creates a risk of death and the actor who recklessly does so.[108] If culpability level is relevant to grading, why should a code's grading scheme fail to systematically reflect it?

C. Dichotomous vs. Continuous Judgments: Using Rule-Articulation and Liability-Assignment Forms in Grading

While modern codes incompletely take account of the seriousness of the harm and the culpability level in grading a violation, they commonly fail to see the grading significance of some issues altogether. Causation, for example, is treated by modern codes as a simple yes-no issue. It is presented as a fixed point cutoff: either the actor is causally accountable for the result or she is not. The actor can be placed on one of only two points on the continuum of punishment, at the same point as where no result has occurred (the punishment point for an unsuccessful attempt, for example) or at the point of full causal accountability for the full result. This dichotomous rather than continuous formulation of causation does not stand out as unusual under current codes because such discrete forms are common, even typical, of the rule articulation and liability functions. But seeing causation as having a grading function suggests that it, like other grading issues, ought to be formulated to generate results along the continuum of punishment.

A recent empirical survey gave subjects a series of murder scenarios varying only in the actors' degree of causal connection with the death. The causal connection varied in both how necessary it was for the death to occur and in the remoteness of the result from the actors' conduct. The subjects assigned liability in a pattern that suggested that they were sensitive to the same factors recognized by current doctrine as relevant to

106 *Id.* § 220.1(2).
107 *Id.* § 220.2(2).
108 *Id.* § 211.2.

determining causation—the requirements of a necessary ("but for") cause and a result not "too remote or accidental"—but saw the issue of causation as one of degree rather than as dichotomous. The subjects did not require some minimum closeness in the causal connection to then impose full liability. Instead, the degree of liability assigned by the subjects ranged across a wide spectrum. Where the causal connection was weakest, by traditional necessary cause and remoteness criteria, the point of punishment was close to that for an unsuccessful attempt at murder. As the causal connection grew stronger, as death more directly and more immediately followed the actor's conduct, the subjects' imposition of liability increased.[109] This pattern is, of course, characteristic of grading factors.

Some writers have noted the analogy between causation and complicity.[110] An accomplice's aid to a perpetrator is a form of causal contribution to the offense. It should be no surprise, then, to find the same pattern of shared intuitions on causation, noted above, with regard to an actor's degree of assistance to a perpetrator. Current doctrine treats complicity as it does causation: as a dichotomous issue. In other words, it treats complicity in a fashion consistent with a rule articulation and minimum-liability function. But in an empirical survey similar in form to that discussed above, the subjects saw the nature and extent of complicity as an issue highly relevant to the grade of the violation. When given a series of scenarios similar in all respects except for the degree of the accomplice's causal contribution to the principal's offense—necessary versus sufficient, extent of contribution compared to the perpetrator and others—the subjects assigned different degrees of liability according to their perception of the degree of the accomplice's contribution.[111] This means, for example, that the subjects would never assign the same degree of liability to an accomplice helping to unload the drug shipment as to the organizer of the operation.

Note that the issue of grading according to degree of assistance to a perpetrator goes beyond the grading issue in causation in an important way. Causation is a grading issue from start to finish. Assisting a perpetrator, in contrast, is at base a rule articulation issue. Some minimum degree of complicity is required for liability. What this illustrates is that many factors relevant to rule articulation, or to the minimum requirements of liability, may well be relevant to grading as well. What is identified in this Article as the "doctrines of grading" are those doctrines that serve *only* a grading function. Recall the cumulative serial relation among the doctrines that serve the three functions, discussed in Part II.

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109 ROBINSON & DARLEY, *supra* note 27.

110 *See, e.g.*, Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 369, 582 (1978).

111 ROBINSON & DARLEY, *supra* note 27.

To illustrate the point further, consider the current doctrine's treatment of excuse defenses as part of the liability function. They assure that criminal liability will not be imposed unless the actor could reasonably have been expected to avoid the violation. A failed duress defense, for example, means that, while some coercion may have been present, it was not sufficient to render the actor blameless for the violation. Does it follow, however, that the actor who fails to prove a duress defense is as blameworthy as one who commits the same offense with no coercion whatsoever? While the degree of mitigation may not be dramatic, most people would likely distinguish the two cases. When subjects in a research study were given a series of scenarios that differed in the amount of coercion exerted on the offender, they gave a complete defense in the extreme case but also varied the degree of liability in less severe cases according to the degree of perceived coercion.[112] If codes were to reflect this view, they would allow reductions in grade for excusing conditions short of a complete defense.

One might argue that while codes ought to take into account many more factors, they can only do so much. To try to account for even the most significant factors in grading would require a document even more complex than current codes. The complexity of the punishment judgment requires, the argument might continue, that the task be left primarily to the discretion of sentencing judges. Three kinds of arguments rebut this claim that codes must generally defer to judicial sentencing discretion: we need not defer, we ought not defer, and increasingly we do not defer.

Codes need not defer to judicial sentencing discretion. It is within our current ability to draft codes that take account of the most significant grading distinctions. This may well be difficult if the current multifunctional form of codes is maintained. As suggested here, current codes already try to do too much. If the functions are segregated, however, a separate document could provide a relatively sophisticated grading assessment in a workable form. I have discussed at length elsewhere the kinds of structures and drafting mechanisms that can be used.[113] There is great efficiency in using general principles, for example, to adjust an offense grade up or down according to culpability level, extent of the harm, causal contribution, degree of an actor's responsibility for his conduct, or some other relevant factor. Thus, a code can take account of a wide range of factors in setting the grade of a violation without requiring that the factors be redefined and restated in every offense definition.[114]

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112 *Id.*

113 *See* Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 14-58 (1987) [hereinafter Robinson, *21st Century*]; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988) [hereinafter Robinson, *Legality*].

114 *See generally* Robinson, *21st Century*, *supra* note 113, at 24-27 (discussing sentencing system that provides judges with a process, as well as relevant categories and factors).

So, for example, recklessness as to causing property damage might be a Class D misdemeanor, while purposely causing the same damage might be a Class C misdemeanor. (Such a system is likely to have many more offense grades than the seven or eight typical of current codes, however.)

I will not repeat here more of the discussion on drafting techniques for sophisticated yet workable grading provisions, but two additional general points are worth making. First, the grading task requires something less than the task of sentencing generally. Only the amount of punishment issue need be addressed in grading; the method of sanction issue (prison or house arrest or probation or fine, etc.) may be left to the discretion of sentencing judges without injuring the legality and related interests discussed below, as long as the sanctioning method or methods selected impose the amount of punishment called for.[115] Second, the need for simplicity in application is greatest where a document is intended for wide public dissemination and quick application, as with rules of conduct. If the grading rules are segregated from the functionally mixed provisions of current codes, they can become considerably more complex. We can expect trained and educated criminal adjudicators to apply more complex and more sophisticated provisions than would the untrained and uninstructed citizen. The adjudication process allows an opportunity for thoughtful and thorough application of grading rules that the real world application of conduct rules does not always permit.

A second set of arguments suggests that the code ought not defer to the discretion of sentencing judges—essentially the arguments supporting the legality principle. We ought to articulate the factors that affect the amount of punishment to be imposed because such articulated rules increase the uniformity of punishment among similar cases. Such articulated rules give notice of what conduct is deemed more serious and what less serious, in turn clarifying the deterrent threat for more serious offenses. Such rules also more systematically assure that each additional harm or evil will trigger additional punishment. Where a more-harm-more-punishment principle is adhered to, an articulated grading system better announces the principle and thereby better deters additional harms. Finally, an articulated grading system more effectively preserves for the legislature judgments about the relative seriousness of various societal harms, a judgment appropriately made by the legislative branch in a democratic system. No doubt there is a limit as to how precise a grading system can be. The thrust of these arguments simply suggests that we ought to adopt a system that embodies as much of the grading judgment as our current understandings allow us to articulate.

More comprehensive codification of grading factors also is called for by the tendency of some, including sentencing judges and commissioners,

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115 *See generally* Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, *in* PENAL THEORY AND PENAL PRACTICE (Antony Duff et al. eds., 1993).

to conclude that if the criminal code takes account of a factor it can no longer be relevant to grading. Consider the United States Sentencing Commission's treatment of excusing conditions short of a complete defense. As a Commissioner, I proposed that the federal sentencing guidelines contain a general principle of adjustment to account for excusing conditions that fall short of providing a complete defense.[116] Most of my colleagues strongly argued that the defendant had raised and lost on such issues at trial and ought not be able to raise them again. That is, they saw the present treatment of the issue, as one of dichotomous liability, as meaning that the factor could not properly be considered on the issue of grading. This is not an unreasonable conclusion to draw. It suggests, however, that where a code does not make clear that a factor is relevant to grading, judges and sentencing commissioners may mistakenly assume that it is not relevant, especially if the code recognizes and uses the factor in its liability function.[117]

A third set of arguments in support of an articulation of grading factors and principles is that this is in essence what many states and the federal system are doing as they develop more articulated "sentencing" systems. The movement has been characterized as one of *sentencing* reform, but in truth the vast majority of the reforms would accomplish precisely what the *grading* provisions of a criminal code do: set some general limits on the sentencing discretion of judges for a given kind of offense and offense circumstances. We have tended to keep this false grading-sentencing distinction because constitutional rulings on proof of *offense* elements limit the nature of possible reforms if those reforms appear to amend the criminal code, which sets out offense elements.[118] But it is not always easy to distinguish matters appropriate for legislative grading from matters appropriate for legislatively authorized limits on judicial sentencing, other than by the difference in their location in and out of the code. This is not an argument for petrifying sentencing systems, as constitutional rulings have done to much of criminal codes, but rather for allowing legislatures more freedom in structuring new ways to assess criminal punishment, perhaps by deconstitutionalizing some aspects of the proof requirements for criminal offenses.

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116 *See* Robinson, *21st Century*, *supra* note 113, at 34-38.

117 I think it wrong to draw this implication from the code's failure to use a factor in grading. A better interpretation of the code's treatment would be that some factors are more important in grading than others and that some are more easily reduced to defensible categories than others. Note that the Commission was persuaded that degree of complicity should be adopted as a grading/sentencing factor even though it is a factor recognized by the code and used only in a minimum-requirements role. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL §§ 3B1.1, 3B1.2 (West 1992).

118 *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986) (noting that traditionally no prescribed burden of proof on sentencing factors, Court finds preponderance of evidence standard constitutionally acceptable for proof of sentencing guideline factors).

VI. Summary and Conclusion

This Article suggests that the criminal law has three primary functions: announcing ex ante the rules of conduct, its rule articulation function; determining ex post whether an actor's violation is blameworthy and deserves condemnation as criminal, its liability assignment function; and assessing the general amount of punishment due, its grading function. The current conceptual structure of criminal law, as reflected in the structure of modern codes, shows little sensitivity to these distinct functions. Indeed, the current structure frequently masks functional differences. This masking is unfortunate because, this Article suggests, a functional analysis can provide useful insights in assessing how well the doctrine is performing its functions and how its performance might be improved.

Does the criminal law tell persons what the law commands of them? For a society that complains of the breakdown of shared understandings of acceptable behavior, we do considerably less than we could to make the rules of acceptable conduct accessible to the average person. The rules of conduct can be made clearer by segregating them into a separate code designed to be read by the average person rather than by attorneys and judges. We can improve the educational effect of criminal adjudications by avoiding the ambiguity of acquittals and dismissals. This requires that two alternative, and contradictory, grounds for acquittal be distinguished: no liability because no violation of the rules of conduct; and no liability, despite a violation of the rules of conduct, because the violation is not blameworthy. Ambiguities of this sort inherent in criminal code doctrines also can and should be remedied, for example, by defining justification defenses objectively and providing a separate excuse defense or mitigation for a mistaken justification. It also means defining criminal risks objectively so that persons can better judge the risks that are prohibited. The blameless creation of a prohibited risk should be exempt from liability under separately defined culpability requirements. Is it not possible, and desirable, to have a simpler, clearer statement of the rules of conduct? Might it not be useful to produce a set of rules the basics of which fifth-graders could begin to discuss in their "citizenship classes" and that could form the basis for discussion of a citizen's obligations in classes continuing through high school or beyond?

Does the criminal law impose liability on blameworthy violators and only blameworthy violators, its liability function? Confusion over the function of different aspects of the doctrine results in formulations that fail to answer this question. Current doctrine fails to impose deserved liability on some attempt violations, for example, because it requires elevation of all culpability requirements of the object offense to purposeful. This elevation results from the mistaken view that the very demanding future conduct intention required for criminalization of incomplete attempts must be applied to all other culpability elements, including those

that serve only liability or grading functions. Similarly, current doctrine's involuntariness defense fails to require a showing of sufficient impairment of control to exculpate because it fails to see that both the voluntariness requirement of the "actus reus" and the general excuse defenses perform analogous liability functions and ought to have analogous minimum requirements. The first error—the culpability requirements for attempt—occurs because the doctrine fails to see that different mental elements in attempt are functionally different. The second error—too broad an involuntariness defense—illustrates the reverse sort of error, where the doctrine fails to see that two defenses are functionally similar; the involuntariness defense serves the same function as the general excuse defenses.

Does the criminal law properly distinguish among different grades of violations? Again, confusion over function may account for an underutilization or a failure to consider factors that have a significant effect on grade, at least as significant as factors that the doctrine does take account of. In some cases, the failure is rather obscure because the functional confusion is hidden within a misconceived doctrinal formulation, for example, where culpability terms, designed for a liability function, are used to define prohibited risk, a rule articulation function. The resulting effect is to distort the grading function by aggravating a violation to actually creating a criminal risk when in fact the risk existed only in the actor's mind.

Underutilization of grading factors is somewhat more apparent where the doctrine fails to take account of such significant differences as the extent of resulting harm and differences in culpability level. Relevant grading factors are sometimes ignored altogether, such as differences in an actor's degree of causal accountability for a result, in causal contribution to a violation by another, and in the degree of dysfunction and impairment short of complete excuse. These weaknesses in current grading schemes result in part from a failure to make an independent assessment of the doctrine's performance of this function.

Whether criminal law doctrine ought to be reconceptualized around its three primary functions remains unclear. More experience in using these functional distinctions may give a better sense of whether such reconceptualization is warranted.[119] One can imagine a separate document specifically drafted to perform each function: a code of conduct

[119] Clearly, reconceptualization around the functional distinctions would be better than the present conceptualization summarized in Part I. It is unclear, however, whether another structure might be more useful. For an example of a structure somewhat closer to that of current law, see Robinson & Grall, *supra* note 11; Robinson, *supra* note 29, at 199-291; Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609-76 (1984) (suggesting a three-part structure of offense definitions, general defenses that would provide a defense even if the elements of the offense definition are satisfied, and doctrines of imputation that would impose liability even if the elements of the offense definition are not satisfied).

written for the general public to announce the criminal law's rules of conduct; a code for the adjudication of violations to determine whether the blameworthiness conditions are sufficiently satisfied to justify criminal conviction and condemnation; and a grading/sentencing code that takes account of the range of factors that affect our assessment of the amount of punishment called for. This last code might be supplemented by a set of guidelines to help sentencing judges decide the method by which the amount of punishment previously determined ought to be inflicted, a decision that may be subject to factors unrelated to the offender's degree of blameworthiness and informed by empirical evidence on the sanctioning method that will best prevent future offenses by this or other potential offenders.[120]

The code of conduct for the public, the liability code, and the grading code might have different structures, reflecting their different functions. The first ought to be simple yet comprehensive, preferably using objective criteria and easily understood standards.[121] Here the legality principle ought to be applied so as to maximize notice of the conduct that is criminal. The second and third, which are directed to judges, lawyers, and, through instructions, to juries can be more complex and judgmental.

The liability code need only assess whether the minimum requirements of blameworthiness are satisfied; a discrete yes or no decision is sufficient. The procedural safeguards for this determination ought to be high, for it is at this stage that the criminal justice system's jurisdiction over the offender is established and the condemnation of conviction is dispensed. The legality principle ought to be applied here in a way that maximizes the uniformity in treatment of similar cases.

The grading code, in contrast, calls for judgments on matters of degree. The factors influencing amount of punishment typically will range across a continuum. The challenge here is to quantify the factors and find where on the continuum a particular offender falls and how the relevant factors interrelate in assessing the amount of punishment called for. The judgmental nature of such decisions, as well as the fact that the authority for criminal jurisdiction has previously been established, suggests that procedural rules and adherence to legality can be somewhat more flexible here than at the liability stage.[122]

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[120] For a discussion of such a system and its special virtues, see Robinson, *21st Century*, *supra* note 113, at 53-58; Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 34-36 (1987); Robinson, *supra* note 115.

[121] For example, New Jersey has pending a proposal to reformulate its justification defenses in an objective form on the theory that this will make it easier to train police on the rules for permissible use of force. *See* NEW JERSEY ATTORNEY GENERAL'S TASK FORCE ON THE USE OF FORCE IN LAW ENFORCEMENT, REPORT 105-08, 115-16, 128-32 (1992).

[122] For further discussion of the grading and sentencing as a single process, its difference with the liability assessment function, and the implications of these functional similarities and differences, see Robinson, *Legality*, *supra* note 113, at 396-400.

It is premature to propose seriously these kinds of ambitious reforms. An investigation of their feasibility and attractiveness is a study in itself. But it is not premature to suggest that analysis of criminal law doctrine in light of its functions gives insights into how to improve current doctrine's performance. Some insights and their corresponding reforms are described here.[123] No doubt others can use functional analysis to reveal other weaknesses and to formulate other reforms.

[123] Given the financial and political limitations on other methods for improving the performance of the criminal law, the kinds of reforms proposed here may be worth considering. Most are within our control and do not call for additional resources.